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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
APPELLANT,

vs.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE, HARRY A. BARR and OTTO KERNER, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

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No. 230

NATURAL GAS PIPELINE COMPANY OF AMERICA,
a corporation,

VS.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLEES.

CORRECTION OF APPELLANT'S STATEMENT OF THE CASE.

(Appellant's Brief, pp. 1-18.)

MAY IT PLEASE THE COURT:

Appellant in its brief at pages 1 to 18 sets out what is titled as "Statement of the Case" but the various subdivisions from pages 3 to 18, inclusive, consist almost entirely of argument. Although we believe that all of appellant's contentions are fully and completely met by our argument (pp. 21-78) in this brief, we shall

answer briefly here some of the arguments contained in appellant's "Statement of the Case."

Appellant has set out correctly at pages 1 and 2 of the brief the material facts involved in this proceeding with the exception of the allegation that appellant's business is "national in character." This was denied in appellee's answer. (R. 56.) Moreover it is not true, as appellant has stated, that Chicago District Pipeline Company has made full response to the citation issued against it by the Illinois Commerce Commission, hereinafter called "the Commission." The facts are correctly set up in appellant's bill where it is alleged (R. 3) that "Chicago District Pipeline Company had closed its evidence, completed its proof and rested its case." In order to make "full response" to the citation Chicago District Pipeline Company would, under the decisions of this court hereinafter referred to,[1] be required to show that its payments to appellant are not unreasonable. Chicago District Pipeline Company has failed to present such evidence although the Commission sought to obtain the information, now requested from appellant, from one of the directors common to the two companies, who testified before the Commission. Moreover, "full response" to the citation will include an answer, if any there might be, to the evidence which will be introduced on behalf of the Commission which will include an analysis of the information requested of appellant. Introduction of this evidence has been delayed by the pendency of this injunction suit.

At page 4 of its brief appellant has set out its two primary contentions, and we submit that those are the fundamental issues involved in this case, namely,

[1] Page 34, this brief.

whether or not Section 8a of the Illinois Public Utilities Act authorizes the order entered by the Commission on March 3, 1937, and whether if so construed the statute and the order contravene any portions of the Constitution of the United States.

Both in the section headed "Summary Statement of Issues" and that headed "Analysis of Section 8a of the Public Utilities Act" appellant has made a number of erroneous statements. For example, appellant states at page 3 of the brief that "the statute, as construed by the Commission, gives it jurisdiction over 'affiliated interests' to require them to give the Commission access to their books and records, and to prepare and submit such statistical data and reports as the Commission may direct." Section 8a of the Illinois Public Utilities Act specifically and definitely delegates to the Commission only the power to require reports of affiliated interests with respect to transactions between affiliated interests other than ownership of stock and receipt of dividends.

Again, at the same page, appellant charges that the Commission has stated that its purpose in ordering appellant to prepare and present certain reports is "for the stated purpose of enabling the Commission to pass judgment upon the reasonableness of the earnings received by appellant under its contract with the Chicago District Company, on the theory that 10 per cent common stock interest is the equivalent of common control of or the absence of arm's length bargaining between two corporations, regardless of what the actual facts may be." The order of the Commission complained of here and the sworn answer of these appellees state specifically that the purpose of the Commission in requiring the reports of appellant is to

permit the Commission to determine the proper allowance to be made as an operating expense of Chicago District Pipeline Company for the purchase of natural gas from appellant. Moreover, as will be shown more fully hereafter, the Commission, having found that appellant came within the class of persons and corporations defined as "affiliated interests" in Section 8a, complied with the statutory duty imposed upon the Commission by said section.

At page 4 of the brief appellant states that it "asserts as a fact, alleges in its complaint (R. 4, 5), and is ready at the first opportunity to prove that the relationship between it and the Chicago District Company does not result in common control of the two companies, and did not, in any degree, or in any manner influence the actions or policies of either party to the contract or any of the terms or provisions thereof, that, on the contrary the contract was executed after the most rigid arm's length bargaining in an open competitive market." In the first place, appellant, neither at the places in the record referred to nor at any other place in its bill made such an allegation. The only thing which the District Court had before it and which this court has on this question is the allegation of the appellees in their sworn answer (R. 57) that

> "on July 25, 1931, when the contract between the plaintiff, then known as Continental Construction Corporation, and the Chicago District Pipeline Company was entered into, a copy of which contract is set forth as Exhibit A to plaintiff's bill of complaint, and prior thereto during the negotiations leading to the construction of said pipeline project and the execution of said contract, there was a common interest in said pipeline project between Chicago District Pipeline Company and the dis-

tributing companies, namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company on the one hand, and plaintiff and persons or corporations owning or controlling stock or other securities of the said plaintiff and gas acreage used to supply gas by said plaintiff, on the other, by reason of stock holding (fol. 26) interlocking directorates and business understandings between said corporations and persons controlling or representing said corporation. Allege that no pipeline company other than plaintiff operates in or near the territory served by said Chicago District Pipeline Company. Allege that the agreement of forbearance executed by and between plaintiff and said Chicago District Pipeline Company on or about December 31, 1935, furnishes no safeguard or guaranty of the reasonableness of the price of gas sold to said Chicago District Pipeline Company by said plaintiff so as to warrant the use of said price as a test of the reasonableness of the operating expenses of said Chicago District Pipeline Company."

The District Court correctly found (R. 95) that "no pipeline company other than plaintiff operates in or near the territory served by Chicago District Pipeline Company and that plaintiff has no competition from other wholesalers of natural gas in the Chicago area." Appellant's claim that it is ready to prove at the first opportunity its lack of common control with Chicago District Pipeline Company is ridiculous in view of the fact that this suit has been pending in the District Court of the United States for the Northern District of Illinois since March 11, 1937. The answer of the appellees denying all of the material allegations in appellant's bill and alleging certain new matter, which, if true, would defeat the right of appellants to an injunction, has been on file since April 7, 1937. Although the order of the District Court under review here is dated

July 2, 1937, that court had indicated at least a month before that time that the application of appellant for an interlocutory injunction would be denied. Despite the fact that the case has been at issue now for approximately seven months and the interlocutory injunction was denied five months ago, appellant has not yet made any effort to have this matter set for hearing on the merits.

Appellant's "Analysis of Section 8a of the Public Utilities Act" (appellant's brief, page 5) contains an argument which we believe is fully answered at pages 21 to 27 of this brief. However, it might be pointed out that the argument which appellant seeks to make based on a construction of paragraph 2 of Section 8a as limited by paragraph 3 thereof, is one which was not made either to the District Court or to Mr. Justice Roberts when appellant's application for a stay order was heard by him.

In the section titled, "The Order of the Commission Assailed in this Cause" (brief, p. 8), appellant again makes the erroneous statement that the Commission in its order proceeded on the conclusive presumption that the existence of a 10 per cent common stock interest or a common director or elective officer is the equivalent of a finding of fact after an investigation and hearing that substantial influence has actually been exercised over the policies and actions of the public utility. We shall demonstrate the proper construction to be placed on Section 8a.

The appellant charges at page 9 of its brief that the Commission proposes, in fixing rates of Chicago District Pipeline Company, to completely disregard the

contract price at which appellant sells gas to the Chicago District Pipeline Company. We submit that it is entirely clear from the citation issued against Chicago District Pipeline Company, the order complained of here and the answer of these appellees filed in the District Court, that what the Commission proposes to do is to determine what a reasonable allowance for operating expenses of the Chicago District Pipeline Company for its purchases from appellant may be, considering all of the material evidence which may be before the Commission on the subject.

Appellant again, at page 9 of its brief, charges that the Commission intends to determine from the data which appellant is required to produce and from its records required to be made available, what the appellant should be permitted to receive from the sale of gas in interstate commerce. As will be more fully set out hereinafter[1] the Commission is not concerned with what appellant either may or should receive from the sale of its gas to Chicago District Pipeline Company. The only concern of the Commission is as to the proper allowance to be made for this item as an operating expense in fixing the rates of Chicago District Pipeline Company. The very language of the order of the Commission and the answer of the appellees, quoted by appellant in its brief at page 10, demonstrates this conclusively.

In connection with appellant's discussion, at pages 11 and 12 of its brief, of prior action of the Commission with respect to the rates of Chicago District Pipeline Company, none of which appears in this record, we feel impelled to advise this court more fully as to the actual facts of that situation.

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[1] Page 24, this brief.

When, in 1933, the Commission entered an order refusing to approve the contracts between Chicago District Pipeline Company and the local distributing companies and ordered said company to fix substantially lower rates, the company filed a bill in the District Court for the Northern District of Illinois, Eastern Division, praying for an injunction to restrain the Commission from enforcing said rate order. A temporary restraining order and an interlocutory injunction were issued and the matter referred to Henry P. Chandler of the Chicago Bar, as a Special Master, for the purpose of conducting hearings on the issues involved in this cause. All of the testimony introduced before the Commission and additional evidence was put in the record before the Special Master and the case closed. No additional evidence as to earnings of appellant was introduced before the Master. Mr. Chandler then submitted to the parties a tentative report which has been referred to by appellant in its memorandum of authorities filed in the court below. The Special Master came to the conclusion that a permanent injunction should issue but found against the complainant on the principal issue in the case, namely, whether the Commission had the power in determining a proper rate for Chicago District Pipeline Company to consider the value of the property of this appellant and its estimated expenses in producing and transporting the gas sold to Chicago District Pipeline Company. The Special Master, having concluded that the Commission was justified in making a determination similar to the one made by this court in *Dayton Power & Light Company* v. *Public Utilities Commission of Ohio* (1934) 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267, proceeded to make that determination and since he came to the

conclusion that the Commission had been in error in its finding as to the life of the gas fields supplying the gas it was necessarily in error in determining the proper allowance to be made for the depletion reserve.

After receipt of this tentative report the parties began lengthy negotiations which were terminated December 31, 1935, when the Commission entered an order allowing Chicago District Pipeline Company to file its present schedule of rates which differed from the rates fixed by the Commission's order of June 16, 1933, (which was complained of in the District Court in the proceeding just referred to) by an amount calculated to correct the error found by the Special Master to have been made in the allowance for depletion in the Commission's previous order.

On the same date appellant and Chicago District Pipeline Company entered into an agreement of forbearance (R. 36) which was calculated to reduce the price of gas to Chicago District Pipeline Company by an amount sufficient to permit it to sell gas to the local distributing companies at the rates filed with the Commission.

In the order of December 31, 1935, allowing Chicago District Pipeline Company to file the present schedule of rates the Commission specifically stated (R. 45):

> "that the consent herein should be granted with the express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipeline Company;"

As was pointed out in the order complained of here two of the officers of appellant appeared before the Commission, when it was first considering the reasonableness

of the rates of Chicago District Pipeline Company in 1932, and one testified as to the estimate of the earnings and expenses of appellant and the other as to the actual experience of appellant for the first few months it had carried on the business. The court can well understand that with Chicago District Pipeline Company already supplying natural gas to the local distributing companies and they in turn a mixture of artificial and natural gas to their customers, it was imperative that after approximately four years of litigation the Commission take some action which would fix, if only temporarily, the rates for this gas. The point which appellant attempts to make—that a citation was issued by the Commission against Chicago District Pipeline Company only eleven months after the order allowing the filing of the present schedule of rates—is meaningless in the face of these facts.

We submit that the statement made by appellant in its brief, at page 12, that the Commission has no jurisdiction to increase appellant's interstate rates, shows as clearly as anything might, the fallacy in appellant's claim that the Commission seeks to regulate its interstate business.

The argument which appellant makes beginning at page 12 of its brief titled, "Injury to Appellant Resulting from Compliance with the Order" was made in the lower court and was apparently not convincing. Most of the allegations contained in this section appear in the affidavit of one C. E. Holmes in support of appellant's application for an interlocutory injunction and in part, at least, have no connection with any portion of appellant's bill. We should like to call the court's attention at this point to two things which we feel it is important to consider in connection with the claims of appellant as to

the "great and irreparable" damage which compliance with the Commission's order would bring about.

In the first place, appellant appears before this court pleading that it be allowed to violate a fundamental maxim of equity, namely, that "he who seeks equity must do equity." The Chicago District Pipeline Company procured the Commission to allow it to fix and file certain rates largely—as is pointed out in the order complained of here—on the basis of testimony by officers of appellant as to its earnings. (R. 48.) Appellant now having had three full years of operating experience, the Commission, as it says, finds it imperative that they be advised as to the actual operating experience of appellant in order that they might determine, after comparing the actual experience with the estimates, whether or not the allowance made as an operating cost to Chicago District Pipeline Company for the purchase of gas from appellant, was reasonable. (R. 48, 51.) Appellant, who then so freely and so willingly permitted its officers to testify as to *estimates* when its affiliate, Chicago District Pipeline Company, was seeking permission and approval of this arrangement, now claims that its constitutional rights will be infringed if it is required to disclose its actual *experience*.

Moreover, if appellant's claims as to damages and injury which it will suffer if it is forced to comply with the Commission's order are examined, it is immediately apparent that aside from the very nominal cost—nominal both actually and relatively—of supplying the information requested by the Commission, the injuries which appellant claims to fear are at most injuries to future profits.[1]

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[1] See page 75, this brief.

Beginning at page 15 of its brief appellant attempts to show that the action of the Commission here complained of is unnecessary to the proper regulation of intrastate gas rates.

We have already referred to appellees' allegation in the answer as to the community of interest which existed between the stockholders of appellant, including the local distributing companies in Chicago (the principal one of which is The Peoples Gas Light & Coke Co.) at the time the project of transporting natural gas from Texas to Illinois was begun.[1]

It is not true, as is shown by a quotation from a previous Commission order at page 16 of appellant's brief, that the Commission ever approved the price at which gas is currently sold by appellant to the Chicago District Company. All that the Commission did find was that the price at which the natural gas was to be sold was lower than the cost to the local distributing companies of manufactured gas, and the savings which appellant refers to as having accrued to the consumers by virtue of the use of a mixture of natural and manufactured gas, instead of manufactured gas, are due entirely to that differential and to the action of the Commission which has been heretofore referred to[2] in requiring Chicago District Company to reduce its rates to the local distributing companies in its order of December 31, 1935, hereinbefore referred to.

By quoting from a previous order of the Commission on page 16 of appellant's brief, the appellant argues in effect, that the Commission has approved not only the price at which gas is currently sold by appellant to

[1] Page 4, this brief.
[2] Page 9, this brief.

the Chicago District Company, but has also approved, for the life of the contract between appellant and Chicago District Company, the contract price as the sole measure of the reasonableness of Chicago District's operating expenses. While the contract was placed in evidence before the Commission in the original Chicago District rate case, neither the company nor the Commission ever took the position that the Commission had power to approve or disapprove that arrangement. Merely because the Commission permitted Chicago District to file a schedule of rates for the sale of natural gas to Peoples Gas and other distributing companies, did not mean that the Commission had approved either then, or for the life of the contract, the contract price as the proper measure of the operating expenses. Not only did the Commission expressly state that it was not then determining whether or not the cost of gas to Chicago District Pipeline Company is reasonable, even as reduced by the contract of forebearance, but the Commission's consent was given with the "express reservation and upon the condition that nothing herein contained shall in any manner affect the Commission's power at any time hereafter, by appropriate proceedings, to inquire into and determine the reasonableness of the cost of gas to the Chicago District Pipeline Company." (R. 45.)

The suggestion that the Commission has approved Chicago District's operating expenses for the life of the contract would have meant that the Commission was giving up the inherent power of the State to regulate Chicago District's rates for a period of 15 years. Obviously the Commission did no such thing, contemplated doing nothing of the sort, and had no legal power to

waive the inherent right of the State to regulate rates of utilities subject to its jurisdiction.

While it is true that the Commission has this year on May 21, denied an application of The Peoples Gas Light & Coke Company for permission to increase its rates to its customers in the City of Chicago, there is now pending in the Circuit Court of Cook County an injunction suit to restrain the enforcement of that order, and the Special Master to whom the case was referred for the taking of proofs, has already rendered a report recommending that an injunction issue and the hearing on exceptions to that report will be heard shortly. The reference of appellant to the citation issued by the Commission against Chicago District Pipeline Company to show cause why its rates should not be reduced, as a basis for appellant's position that the Commission is not justified in requiring appellant to submit the information requested, is without merit since that citation proceeding cannot go on because the Commission is unable to procure the evidence which this court has declared is material to a determination of the proper operating expenses of a company situated as is the Chicago District Pipeline Company.

It should be noted at this point that in addition to the fact that payments to appellant represent more than 95% of the total operating expenses of the Chicago District Pipeline Company, the value of the property of that company is low since it consists only of a relatively small amount of pipe line extending from Joliet, Illinois, at which point the gas is taken from the line of appellant, to the city limits of Chicago. It is readily apparent, therefore, that in determining the rates of Chicago District Pipeline Company, the most

important factor by far is the question of the reasonableness of this item of its operating expenses.

Despite the fact that the Commission has denied the application of The Peoples Gas Light & Coke Company for a rate increase and regardless of the decision of the Circuit Court of Cook County in the injunction suit now pending which has been referred to, the Commission is obliged to enforce the provisions of Section 32 of the Illinois Public Utilities Act which forbids any public utility within the state from charging more than a just and reasonable rate for its services. The Commission, therefore, is under a duty to proceed with its investigation of the rates of Chicago District Pipeline Company.

Appellant argues that if the Chicago District Pipeline and appellant were a common enterprise the Commission could obtain any desired information concerning that enterprise from the local utility, and then concludes from the fact that the Commission has been unable to obtain the information necessary to determine whether or not the price paid by Chicago District Pipeline Company to appellant for gas purchased from it is reasonable, that the presumption that a common enterprise exists is false and arbitrary. That conclusion, of course, is a *non sequitur*. As has already been pointed out,[1] the Commission was unsuccessful in its efforts to obtain this information from the local utility, since the latter claimed that the information must come from the books and records of appellant. As will be shown in more detail later in this brief,[2] if, by the injection of a subsidiary pipeline company between appellant and its actual customers, the local distributing companies,

[1] Page 2, this brief.
[2] Page 30, this brief.

the Commission can be prevented from making the investigation which this court has heretofore said must be made, the Commission will be powerless to regulate adequately the rates of either the subsidiary pipeline company or the local distributing company.

The Commission is charged with the duty under Section 8a of making an investigation when certain facts appear as to the relationship between public utilities under the Commission's jurisdiction and other persons or corporations, and this duty the Commission performed in issuing the order complained of here.

We submit that for the foregoing reasons and others which we shall set out in our argument, it was absolutely imperative that the Commission take the action here complained of in order that the Commission might perform its duty of regulation of an intrastate public utility; that Section 8a of the Public Utilities Act properly construed, authorizes such action, and that neither that section of the statute, nor the order of the Commission complained of deprives the appellant of any of its constitutional rights.

SUMMARY OF ARGUMENT.

1. The order of the Commission is expressly and necessarily authorized by Section 8a of the Illinois Public Utilities Act. (Pages 21 to 27, this brief.)

The decisions of the Illinois Supreme Court require that Section 8a be construed with the other provisions of the Public Utilities Act. Construed in that way it is apparent that Section 8a was enacted in order to aid the Commission in scrutinizing transactions between operating companies and affiliates rather than, as contended by appellant, to aid the Commission in passing on contracts executed after the date of its enactment.

2. Neither Section 8a of the Public Utilities Act nor the order of March 3rd, is in conflict with the Fourteenth Amendment to the Federal Constitution. (Pages 28 to 48, this brief.)

Inasmuch as Section 8a was enacted for the purpose of providing the means whereby the Commission could obtain information necessary to determine whether the public has been fairly dealt with as a result of transactions between intrastate public utility companies and their affiliates, the section sets up a reasonable standard for inquiries into such transactions and is a proper portion of the legislative rate-making process. Its reasonableness is also demonstrated by the equitable principle permitting courts to inquire into transactions between corporations having common directors. The order of March 3rd being authorized by Section 8a is an attempt on the part of the Commission to obtain informa-

tion bearing upon the reasonableness of operating expenses of the Chicago District Company a local utility where rates are under investigation by the Commission. A consideration of the profits of the appellant arising out of the sale of gas to the Chicago District Company is reasonable in the light of the relationship between the Companies, the monopoly character of appellant's business, which is essentially of a public nature, and the fact that the Commission itself was supplied with the estimates of appellant's earnings by one of its officers in an earlier proceeding.

3. The Commission's order complained of does not contravene the Commerce Clause of the Constitution of the United States. (Pages 49 to 64, this brief.)

The purpose of the Commission's order of March 3, 1937, was to obtain information which this court has held as material to a proper determination of lawful rates for an intrastate public utility company, admittedly a proper exercise of the State's regulatory power. The order does not constitute a burden on, nor interference with, appellants' interstate business, and is not a regulation thereof.

4. The court below did not err in denying appellant's application for an interlocutory injunction on the additional ground that the Commission's order complained of was in the nature of a subpoena. (Pages 65 to 67, this brief.)

The Commission admittedly has the power to require the production of material evidence and this court has held that the information requested of appellant is material in cases analogous to this one. The order of the Commission complained of does nothing more than

require the production of such evidence. It therefore is in the nature of a subpoena.

5. This court should not reverse the decision of the statutory court denying an interlocutory injunction since that court did not abuse its discretion or apply improper principles of equity. (Pages 68 to 73, this brief.)

It appeared: (1) that the order of the Commission complained of was duly authorized by the sections of 8a of the Public Utilities Act of Illinois; (2) that 27% of the appellant's common stock was owned by an investment company owning 100% of the stock of the Chicago District Company, an intrastate public utility subject to the jurisdiction of the Commission; (3) that appellant and Chicago District Pipe Line Company have two directors in common; (4) that appellant has a monopoly on the sale of natural gas in the area served by the Chicago District Company; (5) that estimates as to the earnings of appellant had been submitted in an earlier proceeding before the Commission for the purpose of showing the reasonableness of the contract price of gas sold by appellant to Chicago District Company; (6) that the stockholders of appellant were engaged in a common enterprise at the time the transactions, which are presently the subject of the Commission's investigation, were begun; and (7), that there was no infringement on any of appellant's constitutional rights.

6. The court should order the bill of complaint dismissed since appellant has failed to show that any substantial or irreparable injury will result from its compliance with the order of the Commission. (Pages 73 to 76, this brief.)

Appellant's claims as to the damages which it will suffer in the event it is compelled to comply with the

Commission's order complained of here, are conjectural and hypothetical in character. Appellant charges chiefly that injuries will be suffered by it if the Commission reduces the rates of the Chicago District Company. Even assuming that the Constitution protected appellant against such action by the Commission, which we do not admit, the complaint is still premature since the order is only to obtain relevant data. The cost of compliance with the Commission order is nominal both relatively and actually and the protection of the Fourteenth Amendment does not extend to a protection of the conjectural injury alleged by appellants.

7. The appellees are now suffering and will continue to suffer substantial injury if denied access to the information demanded by the order of March 3rd. The Court should disregard the suggestion that even if appellees be found to be entitled to a final decree an interlocutory injunction should be granted. (Page 77, this brief.)

8. The argument set forth at pages 52-54 of Appellant's Brief is not material to the issues in this case. (Page 78, this brief.)

ARGUMENT.

The order of the Commission is expressly and necessarily authorized by Section 8a of the Illinois Public Utilities Act.

(Appellant's Brief, pages 25-28.)

Appellant interprets paragraph 2 of Section 8a, as authorizing the Commission to scrutinize only those contracts with affiliated interests made after the enactment of the section because the Commission by paragraph 3 of this section is given authority to approve contracts with affiliated interests "hereafter made". This argument indicates that appellant fails to appreciate the fundamental purpose of Section 8a and its relationship to the remaining provisions of the Public Utilities Act. It is not true, as appellant suggests, that sub-section 2 of Section 8a relates to the powers conferred in sub-section 3 to approve new contracts, but the act is to be interpreted as a whole. In construing the Public Utilities Act, the Supreme Court of Illinois has said:

> "The statute must be considered as a whole and the intention derived from a consideration of all its clauses and provisions." *Springfield Gas and Electric Company* v. *The City of Springfield* (1920), 292 Ill. 236, 243; 126 N. E. 739.

And this court has held that it will accept the construction of a statute by the highest court of a state. *Missouri Pacific Ry.* v. *Nebraska* (1896), 164 U. S. 403; 41 L. Ed. 489; 17 S. Ct. 130; *Old Colony Trust Co.* v. *Omaha* (1913), 230 U. S. 100, 116; 57 L. Ed. 1410; 33 S. Ct. 967.

The Public Utilities Act, comprehensive in character, was intended to enable the Commission to adequately and fully protect the consuming public in their relations with the local public utilities of the State. The Supreme Court of Illinois has held that the Public Utilities Act "was intended as an effective means of preventing unjust discrimination, undue preferences and extortionate rates and charges by public utilities." *Public Utilities Commission* v. *C. & W. T. Ry.* (1916), 275 Ill. 555, 563; 114 N. E. 325. It has long been established that the fixing of reasonable rates is necessarily dependent upon control over operating expenses. *Chicago & Grand Trunk Ry. Co.* v. *Wellman* (1892), 143 U. S. 339, 345, 346; 36 L. Ed. 176; 12 S. Ct. 400. We submit that the proper construction of Section 8a is that it not only requires Commission approval of contracts between public utilities and affiliated interests, but that it is intended to aid the Commission in the discharge of its rate-making power.

In 1933, the Legislature of the State of Illinois apparently recognized that the provisions of the then existing Public Utilities Act were insufficient to enable the Commission to carry out its statutory obligations. The state was confronted with a problem common to other regulatory agencies and legislative bodies, namely, that the protection and the welfare of the consuming and investing public required control over contracts and other transactions between local operating companies, holding companies and other affiliated interests. This problem was given very serious consideration by governmental agencies concerned with the question of adequate protection of the public in their relations with the utilities. It was during this period that detailed investigations were conducted by Congress through the Federal Trade Commission, by state legislative bodies, and com-

missions; and by many experts who were also concerned with this vital and grave problem.[1] As a result of the attention given by legislative bodies to this problem, 17 states enacted laws somewhat similar to Section 8a.[2] Furthermore, the Public Utility Act of 1935, enacted by Congress, was, perhaps, the most significant attempt to correct the abuses arising out of the relations between holding companies and other affiliates with local operating companies.

Section 8a was but one part of a comprehensive bill (HB 845) enacted during the 1933 session of the legislature. In a message urging its enactment, Governor Horner described this bill as follows:

> "House Bill 845, prepared by the Commerce Commission and submitted to you, seeks to eliminate some of the weaknesses of our present public utility laws, and at the same time so strengthen the Commission's powers as to enable it to protect the public interest in the future. * * * The enactment of the legislation I have suggested will enable an adequate and efficient Commission to go far to assure the public adequate service at reasonable rates, the investor those safeguards necessary to secure his investments, and to accomplish the purposes of state regulation."[3]

In addition to the power conferred upon the Commission to control relations with the affiliates, this bill required utilities to assume the cost of certain investigations (Section 41a); gave the Commission power to prescribe temporary rate reductions (Section 36 as amended); gave the Commission control over invest-

[1] See Utility Corporations, Federal Trade Comm. Rep., Sen. Doc. No. 92, 70th Cong., 1st Sess., part 73-A (1935); Report of New York Comm. on Revision of Pub. Serv. Comm. Law (1930); Report of Massachusetts Special Comm. on Control and Conduct of Public Utilities (1930).

[2] See page 31, this brief.

[3] Message to General Assembly June 6, 1933.

ments and loans to other corporations (Section 27 as amended); conferred upon the Commission power to prohibit payment of dividends (Section 27a); and imposed upon utilities the duty of establishing the value of their property (Section 30 as amended). In other words, the bill was clearly an attempt by the legislature to strengthen the powers of the Commission in order that it might more efficiently and adequately discharge its obligations to the public. The correct interpretation, therefore, of paragraph 2 of Section 8a is that it was enacted in aid of the Commission's general power to protect the public in their relations with the public utilities of the State, and specifically to assist the Commission in the determination of fair and reasonable rates of local utility companies.

As the Commission was (and still is) engaged in an investigation of the rates of the Chicago District Pipeline Company it was proper and necessary that it avail itself of all the provisions of the act which related to its rate-making powers. Since over 95 per cent of the operating expenses of the Chicago District Pipeline Company consists of payments by it to the affiliated appellant for natural gas, it is apparent that the Commission cannot determine the reasonableness of the Chicago District Company's rates to local distributing companies unless it is in a position to determine whether or not its payments to appellant for natural gas constitute proper and reasonable charges to operating expenses.

To suggest that paragraph 2 relates to contracts submitted under paragraph 3 is unsound since it is obvious that the Commission would, under its general investigatory power, have adequate authority to compel the production of any records or data bearing upon any

contract submitted for its approval. It would not have been necessary to have provided in paragraph 2 for authority to demand records or other relevant data bearing upon contracts submitted for the Commission's approval. The limited effect of Section 8a suggested by appellant is wholly inconsistent with a fair interpretation of its provisions.

Appellant also contends (Brief, p. 26) that " the Commission has made it abundantly clear that the data sought will be used to disable the local utility from performing any contract which would be disapproved under Paragraph 3 if hereafter made." There is nothing in the record or elsewhere to sustain this argument. The Commission merely seeks the information in order to determine whether or not the operating expenses and rates of the Chicago District Company are fair and reasonable. The Commission has not pre-judged this proceeding. It has not determined that the operating expenses of the Chicago District Company insofar as they relate to payments for natural gas to the appellant are either reasonable or unreasonable. It has not indicated that it will require the Chicago District Company not to perform its contract with the appellant, but rather has disclaimed any intention of exercising any control over the arrangement. (R. 59.) A fair inference from the appellant's statement is that the contract price is not a proper measure of the fair and reasonable operating expense of Chicago District Pipeline Company.

The question of statutory interpretation involved in *Harriman* v. *Interstate Commerce Commission* (1908), 211 U. S. 407, 419; 53 L. Ed. 253; 29 S. Ct. 115, is not analogous to that presented in this case as is suggested by the appellant in its brief, page 27. This court there

held, "that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint." The rates of the Chicago District Company are a proper object of complaint under the Illinois Public Utilities Act. They have been made the object of complaint by the citation of the Commission directing it to show cause why its wholesale rates should not be reduced. (R. 44.) The investigation contemplated by the order of March 3rd is an essential part of the rate proceeding because the Commission must determine the reasonableness of the operating expenses of the Chicago District Company. It will be powerless to fulfill its statutory obligations if denied the information sought in the order. In order to enable the Commission to determine the reasonableness of rates and operating expenses it has been empowered to obtain information from certain classes of affiliates having transactions with operating companies subject to the Commission's jurisdiction. Thus, the *Harriman* case sustains the Commission's position in the present proceeding.

We concur in the suggestion of appellant that the "power of investigation is not an end in itself; rather, it is a means to an end" (Brief, p. 26). The investigation contemplated by Section 8a and the order of March 3rd is a legitimate phase of the inquiry undertaken by the Commission in determining the reasonableness of the rates and operating expenses of the Chicago District Pipeline Company whose wholesale rates are directly under the jurisdiction of the Commission. These wholesale rates directly affect the retail rates to hundreds of thousands of consumers.

We submit, therefore, that since appellant is admittedly included within two of the classifications set up by Section 8a (R. 4-6) and for the reasons hereinbefore set forth, this Court should affirm the conclusion of the statutory court that the order of the Commission complained of was duly authorized by Section 8a.

Neither Section 8a of the Public Utilities Act nor the order of March 3rd is in conflict with the Fourteenth Amendment to the Federal Constitution.

(Appellant's Brief, pp. 28-36.)

Appellant argues (Brief, p. 31) that the provisions of Section 8a "are arbitrary and capricious in their selection of the persons or corporations to be regulated, are unreasonable and burdensome, are without real or substantial relationship to the object sought to be attained, and therefore deprive appellant of property without due process of law, and deny it the equal protection of the laws in contravention of the Fourteenth Amendment of the Constitution of the United States." The basis for this contention apparently is that by defining an affiliated interest as either 10 per cent common ownership of the stock of two corporations, or the existence of a common director, the statute arbitrarily establishes the absence of arm's length bargaining. We propose to show not only that the appellant has failed to establish that the provisions of Section 8a are contrary to the Fourteenth Amendment, but also that both the section and the order of March 3rd adequately meet the test of due process laid down by this court.

In *Nebbia* v. *New York* (1934), 291 U. S. 502, 525; 78 L. Ed. 940; 54 S. Ct. 505, the court set forth the principle which determines whether a state statute fulfills the requirement of due process. The court said:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process,

> as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In the consideration of this problem it should first be noted that by the enactment of the Public Utilities Act the Legislature of the State of Illinois has provided for the regulation of public utilities operating within the State of Illinois. The validity of state laws providing for the regulation of railroads, gas, electric and other utilities by an administrative agency, such as the Commission, for the purpose of protecting the consumers and investors in their relations with public utilities, cannot now be questioned. *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission* (1913) 231 U. S. 456, 465, 466; 58 L. Ed. 310; 34 S. Ct. 152; *Chicago* v. *O'Connell* (1917) 278 Ill. 591, 603; 116 N. E. 210.

We have demonstrated that under the provisions of Section 8a the Commission was specifically authorized to enter the order complained of. We have also shown that the section was enacted in furtherance of the policy of the State to broaden and strengthen the powers of the Commission so that it might be enabled adequately to protect the public in its relations with utilities. (P. 24, this brief.)

One of the most important functions of the Commission is to determine the reasonableness of the rates of the utility companies subject to its jurisdiction.[1] Among these companies is the Chicago District Pipeline Company. This court is well aware of the fact that an essential element in the establishment of the reasonable-

[1] Section 32 ff., Chapter 111⅔ Illinois Revised Statutes 1937. *Public Utility Commission* v. *Chicago and West Towns Railway* (1916) 275 Ill. 555, 563; 114 N. E. 325

ness of utility rates is the determination of a proper allowance for operating expenses. *Chicago Ry.* v. *Wellman, supra. Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U. S. 151, 78 L. Ed. 1182; 54 S. Ct. 658. In the case of Chicago District this element is of paramount importance because Chicago District is merely an intermediary company between the large local utilities and the appellant and its property would therefore be expected to be of relatively small value. For this reason the valuation of property and rate of return, which are the other two elements to be considered in determining the reasonableness of rates, are of little importance. And again, since the payments of Chicago District for natural gas represent over 95 per cent of its total operating expenses, these payments obviously become the all important element in the determination of the reasonableness of the rates of Chicago District. Thus, if the Commission is to be deprived of the opportunity of getting information as to the reasonableness of this item and must accept as a proper operating expense the price which Chicago District pays appellant under the contract, it will be deprived of substantially all of its power of determining the reasonableness of the rates of Chicago District.

It is therefore indispensable that the Commission be given an opportunity to examine appellant's accounts and records in so far as they concern transactions with the intrastate company for the purpose of determining whether, in fact, the contract price being paid is a reasonable operating expense. As Section 8a provides the power under which the Commission may make such an inquiry, we think it is clear that it is not arbitrary or capricious and that it has a reasonable and proper relationship to the rate-fixing duty imposed upon the Commission.

We submit that the basis upon which inquiries are permitted by Section 8a into transactions between affiliates and local operating companies provides a proper method for discovery and correction of possible abuses arising out of transactions between operating companies and affiliates. The investigations conducted by the Federal Trade Commission and other legislative bodies into the relations between holding companies and other affiliates with operating utilities have disclosed serious abuses in the relationship between operating utilities, holding companies and other affiliates. As a result of these investigations Illinois and 16 other states have given their public utility commissions varying authority over transactions with affiliates.[1] The extent of stock ownership alone necessary to constitute affiliation varies from 5 to 25 per cent.[2]

[1] These states are Alabama, Arkansas, Illinois, Indiana, Kansas, Massachusetts, New Jersey, New York, Oregon, Wisconsin, Washington, New Hampshire, Pennsylvania, Virginia, Maine, Vermont and Connecticut. The New York statute was enacted as a result of the recommendation of the Commission on Revision of the Public Service Commissions Law (p. 26, Vol. I). Sec. 8a of the Illinois Act was patterned largely after the New York law.

[2] 5%. New York (N. Y. Pub. Serv. Law, § 110(2)), Alabama (Ala. Laws 1932 No. 232, § 2), Oregon (Ore. Code Ann., Supp. 1935, § 61-281), Washington (Wash. Rev. Stat. Ann., Remington, Supp. 1935, § 10440-1), Wisconsin (Wis. Stat., 1935, § 196, 51(1)).

10%; Illinois (P. U. Act § 8a(2)), Indiana (Ind. Stat. Ann., Baldwin 1934, § 13957 (2)), Kansas (Gen. Stat. 1935, 66-1401), Pennsylvania (Pa. Pub. Util. Law, Acts 1935, Act No. 286, §§ 2(1), 2(8), 601-604), Virginia (Va. Code of 1936, § 3774-b).

20%; New Hampshire (N. H. Pub. Laws, 1926, c. 258-A, § 1, added by N. H. Laws 1933, c. 182).

25%; Arkansas (Ark. Acts 1935, No. 324; § 1h(1)), Maine (Me. Rev. Stat. 1930, c. 62, § 36-A, added by Me. Laws 1933, c. 213), Vermont (Vt. Pub. Law 1934, Title 28, c. 250, § 6087).

New Jersey provides that no contract involving the expenditure of $25,000 or more made by a public utility with any person or corporation owning, holding or controlling 5% or more of the capital stock of such utility shall be valid unless approved (N. J. Pub. Laws 1935, c. 44 § 1).

The Massachusetts definition employs "substantial control" and "absence of equal bargaining power." (Mass. Gen. Laws 1932, Vol. 2 c. 164, § 85.)

Connecticut defines a "holding company" as a corporation, association or person which "controls a gas, electric or water company." (Conn. Gen. Stat., Supp. 1935, § 1414 c(f)).

Seven states' statutes also define an affiliate as those corporations having officers or directors in common with a local operating company.[3] Nine states, including Illinois, have empowered their commissions to investigate accounts and records of transactions between affiliates and public utilities.[4]

In its effort to demonstrate that Section 8a is arbitrary, appellant (Brief, pp. 35-36) attempts to draw a distinction between the way in which an allegedly similar definition is treated in the Federal Public Utility Act of 1935. The argument, which is based entirely on a purported analogy, is as follows:

The Public Utility Act sets up 10 per cent of stock ownership as constituting a holding company. However, in a succeeding section provision is made for exemption if facts are adduced to show that a 10 per cent stock ownership is not properly determinative of the relationship. The fixed measure of 10 per cent is therefore "tempered". Since Section 8a does not similarly temper its provision, the provision is arbitrary.

Appellants overlooked the fact that the paragraphs which they cite define a "holding company," whereas the same section gives a separate definition (Sec. 2(11)) of an "affiliate" of a specified company (and

[3] New York (N. Y. Pub. Serv. Law Art. 6, § 110 (2) (3));
Kansas (Gen. Stat. 1935, 66-1401 (2) (e));
Virginia (Va. Code of 1936 § 3774b (e));
Illinois (P. U. Act, § 8a (2) (f));
Indiana (Ind. Stat. Ann. Baldwin, 1934, 13957 (2) (e));
Oregon (Ore. Code Ann. 1935, 61-281 (e));
Wisconsin (Wis. Stat. 1935, § 196, 52 (1) (e)).

[4] Alabama (Laws 1932, No. 232, § 10);
Arkansas (Acts 1935, No. 324, § 28);
Illinois (P. U. Act, § 8a (2));
Indiana (Ind. Stat. Ann. Baldwin, 1934, § 13957 (2));
Kansas (Gen. Stat. 1935, 66-1401 (2));
Massachusetts (Mass. Gen. Laws, 1932, Vol. 2, c. 164, § 85);
New Jersey (Comp. Stat., Supp. 1924, § 167-21);
New York (Pub. Serv. Law, § 110 (2));
Oregon (Ore. Code Ann., Supp. 1935, § 61-272 (d)).

Section 8a of the Illinois statute deals with affiliates, and not holding companies, *per se*). This is important because the sections in which the term "holding company" is used are concerned primarily with the reorganization and integration of holding company systems and the control of affiliates as to contracts, accounts and reports is separately dealt with in the Federal Act (Sections 13(e), 15(b)). The definition of "affiliate" sets 5 per cent of stock ownership as the measure of affiliation (Section 2(11)). Thus the very act cited by appellants in their attempt to prove that Section 8a is arbitrary justifies the reasonableness of the standard set up in Section 8a as the basis for scrutiny of relations between operating companies and affiliated companies.

We submit, therefore, that the enactment of Section 8a had a real and substantial relationship to the duties imposed upon the Commission, namely, that it should be able adequately to safeguard the public in their relations with utility companies. This court has held that the test of reasonable control "depends on the nature of the business, on the feature which touches the public and on the abuses reasonably to be feared." *Wolff Packing Company* v. *Industrial Court* (1923) 262 U. S. 522, 539, 67 L. Ed. 1103, 43 S. Ct. 630.

In *Nebbia* v. *New York* (1934) 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, the Court reiterated the rule that it will not interfere with a law having a reasonable relation to a proper legislative purpose. There the Court said at pages 537-538 of the official report:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are with-

> out authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio* * * * *Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.*" (Italics ours.)

Appellant's basic contention is that the rule laid down in *Western Distributing Company* v. *Public Service Commission* (1932) 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283, prevents the Commission from considering the profits earned by the appellant from the sale of gas to the Chicago District Company because Section 8a constitutes, without a hearing, a legislative pronouncement that substantial control is actually being exercised over the policies and actions of the local utility. That case was preceded by the decision in *Smith* v. *Illinois Bell Telephone Co.* (1930) 282 U. S. 133, 152, 75 L. Ed. 255, 51 S. Ct. 65, where the court first held that in the determination of the operating expenses of local utilities consideration may properly be given to the profits and earnings of the affiliated or subsidiary supply companies having transactions with operating companies whose rates are in dispute. In *Dayton Power & Light Co.* v. *Public Utilities Commission* (1934) 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647, and *Columbus Gas & Fuel Co.* v. *Public Utilities Commission* (1934) 292 U. S. 398, 78 L. Ed. 1327, 54 S. Ct. 763, the Court also held it proper to go back of a contract in determining the

reasonableness of the local company's operating expenses because of the affiliation of the parties.

In a recent case the Supreme Court of Oklahoma likewise sustained the power of a commission to give consideration to the profits of an affiliated interstate supply company in determining the reasonableness of the operating expenses and rates of a local distributing company, *Lone Star Gas Co.* v. *Corporation Commission of Oklahoma* (1934) 170 Okla. 292, 298, 300, 39 Pac. (2d) 547. After reviewing various cases the court said.

> "This was not an attempt to order the distributor not to pay such sums of money, but rather was an order not to charge, as an item of expense, a sum in excess of the figure found to be the reasonable cost of gas purchased at the city gate. This is a distinction of vital importance in rate making. The rate-making body makes calculations entering into a rate base designed to produce an adequate return. What the company does with its income is no concern of the rate-making body, so long as a full and complete disclosure thereof is made when called for in order that its effect under all the circumstances may be judged properly.
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> * * * * *
>
> "Orders entered as to reasonableness of expenditures may indirectly affect or modify or even abrogate the contracts of Community with Lone Star and Holding Company, but this effect is legal and constitutional. *Arkansas Nat. Gas Co.* v. *Arkansas R. Commission* (1923) 261 U. S. 379, 67 L. Ed. 705, 43 S. Ct. 387. The power of the Commission over rates cannot be defeated by contract between a public service company and its consumers. *American Indian Oil & Gas Co.* v. *Geo. F. Collins & Co.* (1932) 157 Okla. 49, 9 Pac. (2d) 438. Public service corporations may enter into contracts between themselves, but may not thereby defeat or avoid the inquiry of the Commission into them and their effect for the purposes of regulation, supervision, and control of services and rates of public service

companies under our Constitution. *Oklahoma Gas & E. Co.* v. *Oklahoma Nat. Gas Co. supra,* and *Oklahoma Gas & E. Co.* v. *Wilson & Co.* (1930) 146 Okla. 272, 288 Pac. 316.

* * * * *

"In our opinion the Commission was clearly correct in demanding information about Holding Company as to the prices of materials as they enter into the physical setup of Lone Star, and the year to year replacements, repairs, and additions. As was said in our opinion on the appeal by Community, there was an indication that there might be shown to have existed and to exist an unreasonable margin of profit in favor of Holding Company when taken into consideration in establishing the present fair value for a rate base in rate-making proceedings."

And in *State Corporation Commission* v. *Wichita Gas. Co.* (1934) 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321, consideration of the profits of H. L. Doherty & Co.'s service contract was sustained in determining the reasonableness of the destributing company's rates though it indirectly held but 35% of the voting stock of the local company.

An examination of these decisions indicates that the basis for the rule laid down is that the State is entitled to conduct an investigation of the profits of the affiliate due to the opportunity that might exist for the parties to take an unfair advantage of the public.

In the *Western Distributing Company* case the Court said:

"The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate.

* * *

"It is enough to say that in view of the relations of the parties and the power implicit therein arbitrarily to fix and maintain costs as respects the

distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition." (285 U. S. 119, 124, 126.)

In the present proceeding the ownership of 27 per cent of the stock of appellant, the affiliated supply company, by the local wholesale company and its parent companies is admitted. While it is true that in the *Western Distributing Company* case the interstate supply company and the local operating company were part of the same system, in the instant case the project involving the production and transmission of natural gas from Texas to Chicago was the result of a common enterprise. That a common interest existed between the companies participating in the pipeline project has been alleged by appellees and not denied. Paragraph 9 of appellees' answer contains the following allegation (R. 57):

"allege that on July 25, 1931, when the contract between the plaintiff, then known as Continental Construction Corporation, and the Chicago District Pipeline Company was entered into, a copy of which contract is set forth as Exhibit A to plaintiff's bill of complaint, and prior thereto during the negotiations leading to the construction of said pipeline project and the execution of said contract, there was a common interest in said pipeline project between Chicago District Pipeline Company and the distributing companies, namely, The Peoples Gas Light and Coke Company, Public Service Company of Northern Illinois and Western United Gas and Electric Company on the one hand, and plaintiff and persons or corporations owning or controlling stock or other securities of the said plaintiff, on the

> other, by reason of stock holding, interlocking directorates and business understandings between said corporations and persons controlling or representing said corporations."

Furthermore, the appellees have alleged and the statutory court has found that no pipeline company other than plaintiff's operates in or near the territory served by said Chicago District Pipeline Company (R. 57, 95) and the Court has also found "that plaintiff has no competition from wholesalers of natural gas in the Chicago area." (R. 95, Finding of Fact 22.) Since the companies participating in the natural gas project were engaged in a common enterprise and, since appellant has no competition for the sale of natural gas, it follows that the "usual safeguards of bargaining and competition" do not exist.

We submit, therefore, that if it is reasonable and proper to scrutinize transactions between operating companies and affiliates under the circumstances existing in the *Smith* and *Western Distributing Company* cases because of the opportunity of taking unfair advantage of the public, the equally serious opportunities for unfair dealing with the ratepayers which exist in the situation now before this court also warrant probing of the profits of the affiliated supply company. If, as a matter of law, payments to appellant for natural gas are not to be subject to scrutiny, The Peoples Gas Light and Coke Company, the principal purchaser of the gas, might be free to demand, as it has, a substantial rate increase. (R. 45.) Yet, at the same time, the stockholders of that company would be able to profit from the payment of excessive prices for natural gas due to the ownership of 27 per cent of the stock in that company. The operating company would argue that the income re-

ceived from the ownership of stock must be treated as non-utility income. Thus, if appellant is successful, actual and effective regulation of Chicago District and The Peoples Gas Light and Coke Company rates could be avoided by Chicago District's long-term supply contracts for the purchase of natural gas. This case demonstrates the reasonableness of the standard for inquiry into transactions with affiliates set forth in Section 8a.

Appellants have also contended that a statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment, and that legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, and property.

All of the statutes considered in the cases cited by appellants as authority for the proposition that Section 8a of the Public Utilities Act is void,[1] have, without exception, provided that where one fact is proved, the ultimate fact at issue is thereby conclusively established. For example, in *Schlesinger* v. *Wisconsin* (1926) 270 U. S. 230, 70 L. Ed. 557, 46 S. Ct. 260, an inheritance tax statute was involved which provided that gifts made six years before death were to be conclusively presumed as having been made in contemplation of death. The ultimate issue in determining whether a gift can be taxed under the inheritance statutes when made during the life-time of the donor is always whether or not the gift was made in contemplation of death. If it can be shown to have been such it is taxable; if not it goes free of the burden. The vice of the statute lay in the fact that the ultimate question to be determined was

[1] Appellant's Brief, pp. 33-35.

conclusively presumed when evidence tending to prove the date of gift was established.

We submit, however, that Section 8a of the Public Utilities Act is properly construed as delegating to the Commission the duty of determining whether or not an affiliate, as that term is defined in the statute, has taken an unfair advantage of its related local public utility company whenever the facts are such as to fall within one of the eight classes set up by Section 8a. Applying an analysis to this section similar to the one applied to the cases cited by appellant at pages 33, 34 and 35 of its brief, it is immediately apparent that the ultimate issue involved under Section 8a is whether or not a corporation or person has taken advantage of an affiliated domestic public utility. The statute makes no fact or facts give rise to a conclusive presumption as to this. The ultimate issue, therefore, still remains to be proved even though under Section 8a the Commission makes the investigation provided for therein. As we have already pointed out hereinbefore the classification set up in Section 8a is reasonable and entirely relevant to the fundamental object sought to be attained by the Public Utilities Act of Illinois.

The propriety of Section 8a and the order of March 3rd as against an allegation of conflict with the 14th Amendment has, in effect, been sustained in *State Corporation Commission of Kansas* v. *Wichita Gas Company, supra.* Here this court held that an order of the Kansas Commission directing a utility company not to charge more than a certain amount to its operating expenses on account of payments made to an affiliated supply company did not set up a basis for injunctive relief in the Federal courts. The Court held that the order was legislative in character. Like the order in

dispute in this case the Kansas Commission's order was a step in the legislative process of rate making.

This case arose under Chapter 239, Kansas Laws, 1931, which is substantially similar to Section 8a. The Kansas Commission was given jurisdiction over affiliated interests which were defined in substantially the same language as are "affiliated interests" in the Illinois law. The Commission was given access to the accounts and records of affiliated interests and the authority to require reports relating to transactions by such affiliated interests with local operating companies. In addition to the provisions similar to Section 8a a showing of the cost of service was required as to all contracts with affiliated interests before approval.

Pursuant to the provisions of the law, the Commission instituted proceedings to determine the reasonableness of charges by holding companies and affiliates for service and supplies rendered to distributing companies engaged in supplying gas. Extended hearings followed during which considerable evidence was submitted as to the value of the pipeline company's properties, its operating expenses including depreciation and taxes, its gross revenues and income available for return. Following the hearing the Commission entered two orders, the first of which directed the Wichita Gas Company to cease setting aside as an expense item the 1¾% gross charge paid to Henry L. Doherty and to cease setting aside as an operating expense in excess of 30c per mcf for gas purchased from the Cities Service Gas Company, an interstate transmission company. The second order required all distributing companies paying a gate rate in excess of 30c per mcf to deduct the difference between such payment and what the distributing company was then paying at the city gate and to pass the difference to

the consumer. While the only companies before the Commission were the local distributing companies, suit was instituted in the Federal Court to enjoin both orders not only by the local operating companies but also by Cities Service Gas Company, the affiliated interstate pipeline transmission company. Permanent injunctions were granted by the Federal District Court against both orders. (2 Fed. Supp. 792.) This Court, however, reversed the injunction orders insofar as they prevented enforcement of the first order, holding that an order of the Commission directing the distributing companies to cease setting aside as an expense item the payment of a management fee to an affiliated company was legislative in character and that the Commission's proceedings were to be regarded "as having been taken to secure information later to be used for the ascertainment of reasonableness of rates."

If the order in the *Wichita* case did not confer jurisdiction upon the federal courts due to its legislative character the same rule should be applied to the instant proceeding where the order under attack merely requests information. We quote in detail from the opinion of the Court because of the application to the present proceeding:

> "The first order does not purport to establish or prescribe prices to be paid by the distributing companies to the pipe line company or purport to establish any rate to be charged by appellees to their customers. It merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any payments in excess of that price in fixing a rate for domestic consumers.
>
> "We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an

order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise irremediable, injunction should not be granted. *Terrace* v. *Thompson*, 263 U. S. 197, 214, 68 L. ed. 255, 44 S. Ct.

"Appellees in substance suggest that, unless now adjudged invalid and enjoined, the findings and directions of the commission in respect of their operating expenses and the fixing of rates will be binding upon them in later proceedings for the prescribing of rates to be charged by them for gas furnished to consumers and in suits involving the validity of such rates. But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. • • •

"It results, therefore, that appellees in their complaints failed to state facts sufficient to entitle them to a decree enjoining the appellants from enforcing the first order far, as insisted by appellants in oral argument in this court, the challenged provisions are merely preliminary steps in aid of investigations for the ascertainment of the reasonableness of appellees' rates, and they have no binding force in respect of payments to the pipe line company or rates to be charged consumers and cannot be res adjudicata. The decree in so far as it enjoins enforcement of the provisions of that order will be vacated." (Italics ours.) (290 U. S. 561, 568, 569.)

In that case, the statute which authorized the order complained of was substantially similar to Section 8a. We submit therefore that the *Wichita* case is direct authority for the proposition that Section 8a is a valid and reasonable part of the legislative rate-making process.

We submit that Section 8a, as well as the order of March 3rd, is reasonable and proper when considered in the light of the established principle of equity that transactions of two corporations will be scrutinized in order to determine their fairness whenever the Board of Directors of such corporations have members in common.

Among the decisions upholding this principle are *Geddes et al.* v. *Anaconda Copper Mining Company et al.* (1921) 254 U. S. 590, 599, 65 L. Ed. 425, 41 S. Ct. 209, where the Court said:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation, and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved the full adequacy of the consideration. Especially is this true where a common director is dominating in influence or in character. This court has been consistently emphatic in the application of this rule, which, it has declared, is founded in soundest morality, and we now add in the soundest business policy. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 588; *Thomas* v. *Brownville, Ft. Kearney & Pacific R. R. Co.*, 109 U. S. 522; *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658; *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 90."

In the case of *Corsicana National Bank* v. *Johnson*, (1919) 251 U. S. 68, 90, 64 L. Ed. 141, 40 S. Ct. 82, the Court stated as follows:

> "The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority or even the whole membership of their boards of directors in common does

not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders; and certainly where the circumstances show, as by the undisputed evidence they tended to show in this case, that the transaction would be of great advantage to one corporation at the expense of the other, especially where in addition to this the personal interests of the directors or any of them would be enhanced at the expense of the stockholders, the transaction is voidable by the stockholders within a reasonable time after discovery of the fraud. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 589; *Wardell* v. *Railroad Company*, 103 U. S. 651, 657, *et seq.*;"

In *Caldwell* v. *Dean* (1925) 10 F. (2nd) 299, the Court said on page 306:

"There could be no dispute as to the law governing the case. It is well settled that, when a contract made by one corporation with another, through their boards of directors, having common members, is challenged, the courts will scrutinize the transaction closely, and set it aside unless it clearly appears to be fair and just in every respect."

Since it is proper for a court of equity to closely scrutinize such transactions for the purpose of determining whether the stockholders have been fairly dealt with, we insist that it is equally important as a matter of law that a regulatory agency such as the appellee Commission should have authority to scrutinize transactions between such corporations in order to determine whether the transactions are fair to the public. The obligation of utility corporations to deal fairly with the consuming public is one generally recognized by the courts. The Commission, as the duly authorized agency of the State, obligated by law to assure the

consuming public of fair dealings, must be permitted to examine into the effect of contracts between affiliated corporations for the purpose of determining whether the public has been fairly treated. This principle also demonstrates the reasonableness of the standard set forth in Section 8a.

Justification for consideration of the profits of appellant under the *Smith* and *Western Distributing Company* cases in determining Chicago District's operating expenses is also found in the character of appellant's operations. This is true notwithstanding the fact that appellant's rates are not subject to regulation and the Commission has disclaimed any intention to control its rates. Its business is, nevertheless, essentially of a public utility character. In its original bill of complaint it has stated (R. 2) that it is "engaged in the sale, transportation and delivery of natural gas from a point or points in the State of Oklahoma to distributors and consumers of natural gas in the states of Kansas, Nebraska, Iowa and Illinois." The record also shows that 85 per cent of the gas transmitted is sold to the Chicago District Company, and in turn, by that company to Illinois distributing companies. The gas-consuming public of the State of Illinois has a direct and vital interest in its business since it is directly dependent upon the appellant for its supply of gas.

It has long been established that the business of companies such as the appellant is essentially of a public nature. Companies engaged in the supply of gas have been regulated as to rates, service, facilities, etc. (*German Alliance Insurance Company* v. *Lewis* (1914) 233 U. S. 389, 407, 58 L. Ed. 1011, 34 S. Ct. 612.) In *Pennsylvania* v. *West Virginia* (1923) 262 U. S. 553, 557, 558, 67 L. Ed. 1117, 43 S. Ct. 658, the Supreme Court

has held that the business of interstate natural gas pipelines "is of a *quasi* public character." Oil pipelines have also been held to be public utilities and as such subject to regulation. *Producers Transportation Company* v. *Railroad Commission* (1920) 251 U. S. 228, 64 L. Ed. 239, 40 S. Ct. 131; *United States* v. *Ohio Oil Company* (1914) 234 U. S. 548, 58 L. Ed. 1459, 34 S. Ct. 956.) Even if the business of the appellant was limited to the supply of gas service at wholesale it would still be subject to public control. In *Carey* v. *Corporation Commission of Oklahoma* (1934) 168 Okla. 487, 33 Pac. (2d) 788, it was held that a company selling natural gas at wholesale to municipal plants engaged in the local distribution of gas was a public utility subject to regulation by the Oklahoma Commission. In *North Carolina Public Service Company* v. *Southern Power Company* (1922) 282 Fed. 837, it was held that a power company engaged in the furnishing of wholesale electric service to independent vendors was adjudged to be a utility so that it could not discontinue service to a distribution company to whom it had contracted to supply electric energy and where the contract had expired.

As these decisions demonstrate conclusively the public character of appellant's business, whether its rates are subject to direct regulation or not, it would appear that the Commission under the *Smith* and *Western Distributing Company* cases would be amply justified in giving consideration to the cost of service principle (*i. e.* fair return upon value or cost of property) in determining the reasonableness of Chicago District's operating expenses.

The reasonableness of an inquiry into the earnings experience of appellant has also been established by the fact that it submitted estimates of earnings over the

life of the contract to the Commission when the reasonableness of Chicago District Pipeline wholesale rates was before the Commission (R. 48). If it was reasonable and proper to consider these estimates of the earnings experience of the appellant in determining the reasonableness of the operating expenses and rates of the Chicago District Company, then it is equally as important and essential that the Commission be given an opportunity to consider the actual earnings of the appellant under the contract five years after the contract was entered into. By submitting the estimates appellant has itself admitted the reasonableness and the propriety of the inquiry authorized by Section 8a and the order of March 3rd.

We submit, therefore, that Section 8a is not arbitrary or capricious and that it bears a reasonable relationship to the objects sought to be attained by the Public Utilities Act of the State of Illinois.

The order of the Commission complained of does not contravene the Commerce Clause of the Constitution of the United States.

(Appellant's Brief, pp. 37-41.)

The order of the Commission complained of here does not contravene the Commerce Clause of the Constitution of the United States, since it constitutes neither a regulation of, nor an interference with, interstate commerce as those terms are used by this court in determining the constitutionality of state legislative action.

Appellant claims (Brief, pp. 37 to 41) that the order does contravene the Commerce Clause. The argument upon which that conclusion is based is misleading in its implication as to the proper construction to be given both to the order and to Section 8a of the Public Utilities Act upon which said order is based, and is, we submit, erroneous in law. We have no quarrel with the proposition that appellant is engaged in interstate commerce, nor do we question its non-resident status. We submit, however, that the fact that appellant is a foreign corporation, engaged in interstate commerce is not in itself a sufficient basis for the issuance of an injunction to restrain the enforcement of the Commission's order complained of here.

The wording of the general commerce clause "the Congress shall have power to regulate commerce with foreign nations, among the several states, and with the Indian tribes," has been construed as having the negative implication of forbidding the regulation or burdening of interstate commerce by the states.[1]

The power to regulate was defined in *Second Em-*

[1] *Baldwin* v. *Seelig* (1935), 294 U. S. 511; 79 L. Ed. 1032; 55 S. Ct. 497; and cases there cited.

ployers' Liability Cases (1912), 223 U. S. 1, 47; 56 L. Ed. 327; 32 S. Ct. 169, as the power to "foster, protect, control and restrain." "Regulation" therefore must be taken to mean the fostering, protection, control or restraint of interstate commerce. Actually, the order of the Commission does none of these things. We have already discussed in necessary detail exactly what the order of the Commission amounts to.[1]

Appellant in its brief has argued that the order of the Commission places on appellant the burden of showing the reasonableness of gas sold to Chicago District Pipeline Company. To begin with, this is not the "burden" which the states have been forbidden to place on interstate commerce. Actually, all that the Commission has done in this case is to request the appellant to produce evidence material to the issue which this court in *Western Distributing Company* v. *Public Service Commission of Kansas* (1932), 285 U. S. 119; 76 L. Ed. 655; 52 S. Ct. 283; *Smith* v. *Illinois Bell Telephone Company* (1930), 282 U. S. 133; 75 L. Ed. 255; 51 S. Ct. 65; *Dayton Power & Light Co.* v. *Public Utilities Comm.* (1934), 292 U. S. 290; 78 L. Ed. 1267; 54 S. Ct. 647; and *Columbus Gas and Fuel Co.* v. *Public Utilities Commission of Ohio* (1934), 292 U. S. 398; 78 L. Ed. 1327; 54 S. Ct. 763, said a state commission was justified in investigating to determine the reasonableness of the rates of local distributing companies where there were supply contracts in existence between those local distributing companies and affiliated interstate operators.

In *Western Distributing Co.* v. *Public Service Commission* (1932), 285 U. S. 119, 123; 76 L. Ed. 655; 52 S. Ct. 283, it was said:

"*First:* The appellant asserts that the rate

[1] Pages 25-26, this brief.

charge by the pipe line company for gas delivered at the city gate is an interstate rate and not the subject of regulation by any state authority. The soundness of this contention is conceded by the appellees. But the appellant argues that any inquiry by the state commission into the reasonableness of this charge amounts to an indirect attempt at regulation, an effort on the part of the state to circumvent the paramount federal authority over interstate commerce, and hence an attempt to do by indirection what is forbidden by the Federal Constitution. The appellees disclaim any intent to control rates charged for interstate service, but say that as the Commission's function is to set reasonable rates for the intrastate service rendered by appellant in the city of Eldorado, this necessarily requires a determination of the question whether the price paid for the gas distributed is fair and reasonable. To this end the Commission insists upon its authority to make such investigation as will satisfy it upon this point.

"Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for

> an interstate service, does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

That case cannot be distinguished from this one on the ground that here the distributing group holds only a 27% stock interest in the pipeline company, as compared with the total common ownership in the *Western Distributing Company* case, since, as has been alleged in the answer (R. 57), there was a community of interest between the gas producing and distributing groups at the time the contract was entered into, and

> "The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part, the basis of the retail rate." *Western Distributing Co.* v. *Public Service Commission,* 285 U. S. 119, 124.

Certainly if there was no regulation of, interference with, or burden on interstate commerce in the *Western Distributing Co.* case, *supra,* or in *Dayton Power and Light Company* v. *Public Utilities Commission of Ohio, supra, Columbus Gas and Fuel Co.* v. *Public Utilities Commission of Ohio, supra, Smith* v. *Illinois Bell Telephone Company, supra,* there is none here. The decisions in those cases also destroy the force of appellant's argument as to the injury which will result from its compliance with the Commission's order since, if it is disclosure of the facts which will cause the damage the source of the information is immaterial.

Appellant argues that the fact that in the instant case the information is required of the interstate operator creates a burden on interstate commerce. We have

already shown the reasonableness of this legislative action. If the Commission has the power to inquire into the reasonableness of charges to local utilities under supply contracts with affiliates, and we have already shown that this is so, it may secure the necessary information from the best source, namely, the corporation actually keeping the records which show the facts material to the determination of this question. In the instant case that is appellant. An effort was made to secure the information from Chicago District Pipeline Company but it claimed that it was unable to furnish it. The Commission would have been derelict in its duty had it failed to exercise the power vested in it by the legislature of Illinois to secure information necessary to perform its regulatory function. Moreover, it is immediately apparent that in the cases last cited above, even though there was no direct request of the interstate operator, the information which this court considered as material could come only from the interstate supply company's records, so that this court has already approved securing such information from interstate operators.[1]

If it be held that the Commission cannot properly require appellant to produce this information the Com-

[1] Note that in *Smith* v. *Illinois Bell Telephone Company*, *supra*, the witnesses who actually testified as to the reasonableness of the payments by the local operating company to American Telephone and Telegraph Company, the parent company, and the Western Electric Company, an affiliate of Illinois Bell Telephone Company, under supply and service contracts, were officers and officials of American Telephone and Telegraph Company, an interstate operator, and the Western Electric Company. Some of those witnesses and the reference to the places in the record filed with this court at which their testimony appears, are:

Bickelhaupt (R. 270).
Crunden (R. 300, 522, 607, 742, 1403 1434).
Gregory (R. 309, 342, 433, 562, 1069, 1274, 1330, 1367).
Ghefardi (R. 526, 2242).
Heiss (R. 819, 841, 881, 909, 1086, 1144, 1155).
Jewett (R. 611, 2143, 2167).

mission will be prevented from making the investigation which this court considered necessary in the *Western Distributing Company* case and the other cases last cited.

Appellant's point here really amounts to the proposition that a person engaged in interstate commerce cannot be required to give evidence before an administrative tribunal. No cases are cited by appellant as authority for that proposition.

Appellant has cited *International Text Book Co.* v. *Pigg* (1910), 217 U. S. 91, 112; 54 L. Ed. 678; 30 S. Ct. 481 (Appellant's Brief, pp. 39 to 40) as announcing the rule which controls in this case. We submit that the case must be distinguished from the instant case on several grounds. In that case the Kansas legislature had enacted a law requiring that every foreign corporation doing business within the state file certain reports as to its financial condition and business and made the filing of these reports a condition precedent to the right of any foreign corporation to maintain a suit in the state courts. The Text Book Company was engaged, as the court found, in the interstate communication of intelligence in its operation of correspondence courses. The defendant in error, Pigg, had enrolled as a student, had made a partial payment on the tuition fee but had failed to pay the balance due. When suit was brought by the creditor in the state courts of Kansas it was pleaded that the plaintiff had failed to comply with the provision of the statute referred to above and that, therefore, it had no right to maintain its action. This contention was concurred in by the state courts but this court, declaring the statute to be an unconstitutional regulation of interstate commerce, set aside the judgment of the Supreme Court of Kansas.

That case must be distinguished from the instant one since as has been already pointed out[1] the Commission's order here was entered in pursuance of the Commission's duty to fix just and reasonable rates for Chicago District Pipeline Company. In the *International Text Book* case it does not appear as it does here that the reports were required for the purpose of assisting the state government in performing what is conceded to be a valid legislative function—namely, to fix rates for an intrastate public utility.

In the *International Text Book Company* case, *supra*, there was actually a regulation of interstate commerce since the statute imposed a condition precedent to the carrying on of commerce between the states. There is no claim made here by appellant, and one could not be made, that either Section 8a of the Public Utilities Act or the order of the Commission sets up any condition precedent to the right of appellant to carry on its interstate business in the State of Illinois. Even if the order in question is not complied with, the statutes of Illinois provide no means by which the state could prevent appellant from continuing its interstate business, regardless of the validity of such a prohibition.

International Text Book Co. v. *Lynch* (1910), 218 U. S. 664; 54 L. Ed. 1201; 31 S. Ct. 225, and *Buck Stove Company* v. *Vickers* (1912), 226 U. S. 205; 57 L. Ed. 189; 33 S. Ct. 41, are based entirely upon the conclusion reached by this court in *International Text Book Co.* v. *Pigg, supra*, and the distinctions pointed out with regard to that case apply with equal force to both of the later cases.

State ex rel. Cities Service Gas Company v. *Public*

[1] Page 29, this brief.

Service Commission (1935), 337 Mo. 809; 85 S. W. (2d) 890, is cited by appellant as one involving precisely the same situation as is involved in the instant case. When that case is properly analyzed the distinctions between the situation there and here are immediately apparent. In that case the Missouri Public Service Commission began a proceeding on its own motion against the Cities Service Gas Company, referred to in the court's opinion as the Pipe Line, and various local distributing companies subject to the same common ownership and control as the Pipe Line Company. The purpose of the proceeding was "to determine if the Pipe Line was a public utility engaged in the sale and distribution of industrial gas in Missouri and as such required to file schedules of rates."[1]

The conclusion of appellant (Brief, p. 41) that the order of the Missouri Commission did not purport to regulate the rates charged by the interstate company nor to require a valuation of its properties, but merely directed it to file schedules of the rates it charged distributing companies and industrial concerns is misleading. That statement can only be due to an entire misconception of the functions of a public utility regulatory body. If the Pipe Line company in the Missouri case had been—as the Missouri Commission found—engaged in an intrastate business as a public utility and obliged to file with the Commission its schedule of rates and its rules as to service, the Commission would have had the same full and complete power and authority over the pipe line company as it has over other intrastate public utility companies. The fact that in the proceeding then before the Commission there was no question as to the reasonableness of the rates and charges, does not affect

[1] 337 Mo. 809, 814.

the fact that the inquiry in the Missouri case was to determine whether or not the interstate pipe line company was engaged as an intrastate public utility so as to obligate the company to comply with the Public Utilities Act of Missouri and the rules and regulations of the Missouri Public Service Commission.

No such problem is involved here. It is not now claimed, it was not claimed in the lower court, nor was it claimed before the Commission, that appellant is engaged in an intrastate business in the State of Illinois as a public utility. Nor is it proper to compare a requirement that a corporation file its schedule of rates and charges with a public service commission with the requirement in question in this case, since any individual or corporation which would be required to file its rates and charges with the Missouri Public Service Commission (and in this respect the Public Utilities Acts of Missouri and Illinois are similar) would be subject to the jurisdiction of the Public Service Commission as to rates and charges.

Appellant has pointed out that the petition to this court for a writ of certiorari was denied in this case. *Public Service Commission et al.* v. *Missouri, ex rel. Cities Service Gas Company* (1936), 296 U. S. 657; 80 L. Ed. 468; 56 S. Ct. 382. An examination of the petition for a writ of certiorari and the answer thereto discloses that the issue made by the parties concerned was as to the right of a state public utility commission to secure, by writ of certiorari from this court, a review of a decision of the State Supreme Court against the Commission. Distinction of this case leaves no authority supporting appellant's contention.

We should like to call the court's attention to certain cases which we believe are in point as to this situation.

In *Interstate Commerce Commission* v. *Goodrich Transit Company* (1912), 224 U. S. 194, 211, 216; 56 L. Ed. 729; 32 S. Ct. 436, a water carrier had brought suit in the Federal District Court to restrain the Interstate Commerce Commission from enforcing certain sections of the Interstate Commerce Act as to reports and accounting systems. The company claimed that only 20 percent of its business involved carriage by both rail and water and that the remainder of its business was interstate and intrastate port to port carriage, and that since the Interstate Commission had authority only over commerce between the states and over transportation by rail and by joint use of rail and water facilities, enforcement of the Commission's rules as to reports and accounting practices as to all of the carrier's business amounted to the imposition of a burden on both its water transportation service and its intrastate business.

As in this case, the court was obliged first to determine whether or not the statute complained of covered the case, and the court arrived at the conclusion that it did. And it is interesting to note that the construction was in part, at least, based upon what the court considered to be the necessity of so construing the act as to permit the Interstate Commerce Commission to perform efficiently and adequately the duties imposed upon it by the Congress. The court then came to the conclusion that the statute was neither a regulation of, nor a burden on, the intrastate business of a carrier saying at page 211 of the official report:

> "It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such ac-

counts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them."

and at page 216:

"Bookkeeping, it is said is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority."

In *People ex rel. Stead* v. *Chicago, Indianapolis and Louisville Railway Company, et al.* (1906) 223 Ill. 581. 79 N. E. 144, the Supreme Court of Illinois had before it an original petition for mandamus brought by the Attorney General of the state against a non-resident railway company, praying for a temporary order directing the respondents to report to the Railroad and Warehouse Commission, as required by Section 6 of the Railroad and Warehouse Act.

At page 587 of the official report the court quotes Section 6 of the Act as follows:

> " 'Every railroad company incorporated or doing business in this State, or which shall hereafter become incorporated, or do business under any general or special law of this State, shall, on or before the first day of September, in the year of our Lord 1871, and on or before the same day in each year thereafter, make and transmit to the commissioners appointed by virtue of this act, at their office in Springfield, a full and true statement, under oath of the proper officers of said corporation, of the affairs of their said corporation, as the same existed on the first day of the preceding July.' Then follow forty-one clauses designating, in detail, the subjects upon which the report shall furnish information,"

It is apparent from the opinion that the railway company there advanced almost exactly the same arguments as those advanced by appellant and in arriving at the conclusion that the peremptory writ of mandamus should be granted the court, at pages 592, 593, had this to say on the question presently before this court:

> "In the light of these authorities, what should be the rule in the case at bar? Here the State has created an administrative agency, called railroad and warehouse commission. It has enjoined upon this commission certain duties, among others, to examine into the condition and management and all other matters pertaining to railroads, so far as the same concern the relation of such roads to the public and the accommodation and security of persons doing business therewith. They are required to report such facts, statements and explanations to the Governor once each year as will disclose the actual working of the railroad system of transportation, in their bearings upon the business and prosperity of the people. All this is, manifestly, for the purpose, in part, at least, of uncovering the necessity for such corrective legislation as the State may

properly enact. How is the commission to perform these duties unless it has some means of obtaining the necessary data upon which it can act, and such as the executive and legislative branches of the government will require as a guide in the application of appropriate remedies? *Section 6 meets this requirement and is the superstructure of the whole act. This law does not impose any tax or license on the business or the property of the company. It does not direct when or how its trains shall be run, or seek to direct, manage or control its internal affairs. So far as this particular section is concerned, it, in effect says: 'Do your business in your own way, but report to the people of the State once a year what you have, what you are doing and how you are doing it.' This, in our opinion, is not a restriction or a burden on inter-State commerce, within any rule laid down in any of the adjudged cases.* If it be said that the information called for may be used as the basis of some future unconstitutional legislation, we reply that it will be time enough to meet that emergency when it arises, if it ever does." (Italics ours.)

The analogy between that case and the instant one is complete.[1]

The State Supreme Court of Kansas had before it in *State of Kansas ex rel. Public Utilities Commission* v. *Atchison, Topeka and Santa Fe Railway Company* (1923) 115 Kan. 3, 221 Pac. 259, and same title (1924) 116 Kan. 151, 225 Pac. 1026, an application by the Attorney General for a mandamus to compel a domestic corporation engaged in interstate carriage to allow an examination of its books and records primarily as to additions and betterments in accordance with an order of the Kansas Public Utilities Commission. The two opinions were written in the same proceeding, the only

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1 Similar decisions are *Railroad Commission of Texas* v. *Texas & Pacific Ry. Co.* (1911) 140 S. W. 829, and *Texas & Pacific Ry. Co.* v. *Railroad Commission of Texas* (1912) 105 Tex. 386, 150 S. W. 878.

difference being that after the first opini . the defendants filed an answer in which the only new fact that appeared was that the order of the Commission was for the purpose of obtaining evidence for a proceeding then pending before the Interstate Commerce Commission which had been begun by the State Commission. The Supreme Court of Kansas granted the writ prayed for, holding that there was no regulation of interstate commerce nor any burden imposed thereon. The Court likewise pointed out that under the Kansas Public Utilities Act the commission was charged with the duty of beginning and carrying on necessary proceedings before the Interstate Commerce Commission to secure reasonable rail rates within the state and that it was in furtherance of this statutory duty that the action alleged by the railroad company to be unconstitutional was taken.

In the instant case the Public Utilities Act of Illinois imposes upon the Illinois Commerce Commission, the duty of enforcing that section of the Act which limits intrastate public utility companies to a collection of reasonable rates and charges. As has already been pointed out to the court a material consideration in the determination of the reasonableness of public utility rates is the allowance which must be made for operating expenses. The legislature by Section 8a of the Public Utilities Act has imposed upon the Commission the burden of looking behind contracts and transactions between certain individuals and corporations described in the statute as "affiliated interests." The Commission's order of March 3, 1937, complained of here, was entered pursuant to this statutory obligation. It is precisely the same situation which the Kansas Supreme Court approved in the two cases last referred to.

In *Atlas Pipe Line Co.* v. *Sterling, et al.* (1933) 4 F. Supp. 441, a three-judge court, organized pursuant to Section 266 of the Judicial Code, considered the complaint of a common carrier pipe line company, engaged in transporting oil in interstate commerce, that certain orders of the Texas Railroad Commission were unconstitutional. These orders required plaintiff (1) to install meters to enable the Commission to determine the amount of oil transported by it, (2) to file with the Commission on various forms reports required of transporters of oil, and (3) to allow the Commission or its duly authorized agents to inspect plaintiff's books and records when the Commission might deem it necessary. The plaintiff attacked the orders as does the appellant here on the ground that they violated the 14th Amendment and the commerce clause and the court had this to say, at p. 443, about these contentions:

> "Certainly it goes without saying that the terms of a statute or the orders and actions of the commission under it might be so burdensome and exacting as in effect to prevent or prohibit, contrary to the Fourteenth Amendment and the commerce clause, the conduct of the legitimate business of interstate transportation by pipe line. No such burdensome exactions are, however, shown to have been imposed here. It is hardly claimed, it is certainly not proven, that the requirements of the commission cannot be complied with without visiting irreparable injury on plaintiff. What is in effect asserted is that, since plaintiff is engaged in the business of transporting oil, an article of interstate commerce, the commission may not, in regard to reports and disclosures, impose duties upon it which require an expenditure of time, money or effort by it. We think the decisions cited do not support this view. The state may subject interstate, as well as intrastate carriers to reasonable police regulations for the purpose of enforcing the public policy of the state in regard to shipments into or out of it." (Citing cases.)

That case is, we submit, squarely on the point involved here.

As has already been pointed out[1] the plaintiff's claims as to the damage which enforcement of the Commission order will inflict are highly exaggerated in view of the former willingness of the plaintiff to submit estimates and data as to the experience of the first few months as to its business.

We have shown, we submit,[2] that the Commission's action in investigating the reasonableness of the payments to appellant does not contravene the Commerce Clause of the United States Constitution; and[3] that the order of the Commission is not rendered invalid because it requires appellant, the only person who would have full, complete and adequate knowledge and record of the material facts, to submit such facts to the Commission.

We submit, therefore, that on the only reasonable interpretation of the Commission's action and on the basis of the authorities cited, the order complained of does not contravene the Commerce Clause of the Constitution of the United States.

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1 Pages 47, 73ff, this brief.

2 Pages 49ff, this brief.

3 Page 53, this brief.

The court below did not err in denying appellant's application for an interlocutory injunction on the additional ground that the Commission's order complained of was in the nature of a subpoena.

(Appellant's Brief, pp. 41-43.)

Despite appellant's argument to the contrary, there is no inconsistency between the memorandum of the court below and its Findings of Fact and Conclusions of Law. (R. 89-97.) Not only did the court below suggest in its memorandum that the order of the Commission complained of here was justified as being in the nature of a subpoena to require the production of material evidence before the Commission, but the statutory court also *found* (R. 96)

> "The order of March 3, 1937, is valid and proper under the police power of the State of Illinois, since it is in the nature of a subpoena to compel the production of records for the purpose of enabling the Commission to determine the proper operating costs of a utility subject to its jurisdiction."

As we have already pointed out[1] the Commission's order only requires appellant to produce certain evidence in a proceeding now pending before the Commission. A "subpoena" is defined as the process by which the attendance of a witness is required. A subpoena *duces tecum*, of course, is one issued for the purpose of compelling a witness to bring with him certain books, records or documents.[2]

Since the Commission's order requires a report, which is substantially the equivalent of testimony, and since the only difference between the requirement of a sub-

1 Pages 25-26, this brief.

2 Black's Law Dictionary, 3rd Ed., p. 1669.

poena *duces tecum* and the order is that under the former the books and records must be produced for examination before the body hearing the evidence while under the latter the books and records will be examined by agents of the Commission which will hear the evidence while the books are in the hands of appellant, there is no substantial difference between the Commission's order and a subpoena *duces tecum*.

We have already demonstrated, we submit, the materiality of this evidence,[1] so that when appellant concedes, as it must, that "The Commission is given undoubted authority by the Public Utilities Act to subpoena evidence which is relevant and material to any proceeding pending before it over which it has jurisdiction"[2] it has conceded the Commission's right to this information.

The Commission by this order is not asserting the same jurisdiction over appellant's books and records as is exercised over those of public utilities which the Commission regulates, as appellant claims. Section 8a of the Public Utilities Act as has hereinbefore been pointed out authorizes the Commission to inquire into transactions of appellant only with such of its affiliates (as defined in the act) as may be public utilities subject to the Commission's jurisdiction. In this case the order was limited to an inquiry as to transactions with Chicago District Pipeline Company. As is shown by Section 63 of the Illinois Public Utilities Act[3] the Commission has the power to investigate the books and records of a public utility subject to its jurisdiction at any time and for any purpose.

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1 Pages 25, 29, this brief.

2 Page 42 Appellant's brief.

3 Appendix B, page 73, Appellant's Brief.

We submit, therefore, that if the Commission's order which appellant seeks to enjoin is compared with a subpoena which the Commission undoubtedly has power to issue, it is clear that appellant is not entitled to injunctive relief and the statutory court did not err in denying appellant's application for an interlocutory injunction on that additional ground.

This court should not reverse the decision of the statutory court denying an interlocutory injunction since that court did not abuse its discretion or apply improper principles of equity.

(Appellant's Brief, pp. 44-47.)

The statutory court, in refusing to grant an interlocutory injunction, did not abuse its discretion or apply improper rules of equity. The court committed no error in sustaining Section 8a and the order of March 3rd, since neither deprived the appellant of property without due process of law nor denied it the equal protection of the laws, and since the order of the Commission does not contravene the Commerce Clause of the Constitution.

Considering (1) the fact that the Commission was engaged in the discharge of an important governmental function, (2) that in the execution of such function it had exercised the power granted by a provision of the Public Utilities Act intended to aid it in fixing the reasonableness of the rates and operating expenses of the Chicago District Company, (3) that 27% of the stock of the appellant was owned by the parent company of Chicago District Company, (4) that Chicago District Pipeline Company and appellant have two directors in common, (5) that there is no competing natural gas company in the Chicago area and, (6) that the appellant had submitted estimates of its profits in an earlier proceeding, it must be clear that the statutory court entered the only order which could properly be entered under the circumstances of the case.

No evidence is necessary to demonstrate the validity of Section 8a, as it lays down a reasonable standard for inquiry by the Commission into transactions be-

tween affiliates and operating companies. We have already demonstrated that the principle of the *Western Distributing Company* case, *supra,* again cited to sustain the appellant's demand that the decision of the statutory court be reversed, clearly justifies the Commission's order.

We submit that this application of appellant for an injunction can be decided on the legal issues alone and that the District Court properly found for the appellees on those issues.

Appellant contends that this court should reverse the decision of the statutory court on the ground that the court abused its discretion, in denying the interlocutory injunction. We believe that it is clearly apparent that the statutory court applied proper principles of equity and did not abuse its discretion in denying plaintiff's application for an interlocutory injunction.

We submit that the decisions cited, *Ohio Oil Company* v. *Conway* (1929) 279 U. S. 813, 195, 73 L. Ed. 972, 49 S. Ct. 256; *Alabama* v. *United States* (1929) 279 U. S. 229, 230, 73 L. Ed. 675, 49 S. Ct. 266, and *Foster Packing Company* v. *Haydel* (1928) 278 U. S. 1, 73 L. Ed. 147, 49 S. Ct. 1, do not sustain appellant's contention.

In the *Ohio Oil case, supra,* suit was brought in the Federal District Court to enjoin the operation of a tax statute which did not provide for reimbursement of a taxpayer who paid his taxes, and then successfully attacked their validity. This court held that an interlocutory injunction should have been awarded and as a condition thereto, required a bond which would adequately protect the State in the event of its success upon final hearing. In this case, the appellant has not offered any indemnity against the serious damage which the appellees will suffer in the event that an interlocu-

tory injunction is ordered granted by this Court, and subsequently dissolved.

In the *Foster Packing Company case, supra,* this court held that an interlocutory injunction should have been granted and reversed the decision of a statutory court. In that case, however, the Louisiana statute, under review, prevented the shipment of shrimps outside the state boundaries which the court found to be a direct interference with interstate commerce. The regulation was not a conservation measure. In the instant proceeding, the order of March 3rd only incidentally affects interstate commerce to the extent essential to perform an important governmental function.

The *Alabama case, supra,* clearly sustains the position which we have taken, namely, that this court should not disturb the decision of the statutory court. There the Interstate Commerce Commission had entered an order establishing certain intra-state rates intended to prevent discrimination. An application for an interlocutory injunction was denied and this ruling was affirmed by this court on the ground that in the absence of abuse of discretion the decision should not be disturbed. At page 230 of the official report, this court said:

> "Congress has manifested its solicitude that the power to grant writs of injunction against orders of the Interstate Commerce Commission shall be exercised with special care, by requiring the consideration of applications to be made by three judges, and by giving an appeal directly to this court both in the case of interlocutory orders and final decrees."

This statement applies with equal force to the entry of an interlocutory injunction against the appellee Commission for Congress has likewise provided for the consideration of such applications by a court of three

judges and by providing for a direct appeal to this court.

It has been held that an interlocutory injunction should be denied in the absence of a clear showing that the plaintiff will prevail on final hearing.

In *Hall Signal Co.* v. *General Ry. Signal Co.* (1907) 153 Fed. 907, in reversing an order granting an interlocutory injunction, the Circuit Court of Appeals stated:

> "Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied. * * * The attitude of the court may be stated in a single sentence: We think the record presents too many elements of doubt to warrant the issuing of a preliminary injunction" (pp. 908-909).

Nor is the entry of a preliminary injunction warranted in the absence of a clear showing of irreparable injury where its issuance may seriously embarrass the carrying out of an important governmental function.

In *Hurley* v. *Kincaid* (1932) 285 U. S. 95, 104, 76 L. Ed. 637, 52 S. Ct. 267, in the note on that page, the Court said:

> "Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury."

This court has frequently held in confiscation cases that injunctive relief is not warranted except upon a clear showing of violation of constitutional rights.

In *San Diego Land and Town Company* v. *National*

City (1899) 174 U. S. 739, 754, 43 L. Ed. 1154, 19 S. Ct. 804, the court said:

> "* * * judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

In *Knoxville* v. *Knoxville Water Company* (1909) 212 U. S. 1, 53 L. Ed. 371, 29 S. Ct. 148, the Supreme Court held that state rate statutes should be enjoined "only in the clearest cases," and in *Aetna Insurance Company v. Hyde* (1928) 275 U. S. 440, 72 L. Ed. 357, 48 S. Ct. 174, said, "it must clearly appear that the rates would necessarily deny to the plaintiff just compensation."

In *Public Service Commission* v. *Wisconsin Telephone Company* (1933) 289 U. S. 67, 70-71, 77 L. Ed. 1036, 53 S. Ct. 514, where a preliminary injunction was set aside because of the absence of specific findings, suit having been brought to restrain a rate reduction order, the court said:

> "Thus, if the issue is confiscation, the complainant must make a factual showing of the probable confiscatory effect of the statute or order with such clarity and persuasiveness as to demonstrate the propriety in the interest of justice, and in order to prevent irreparable injury, of restraining the State's action until hearing upon the merits can be had."

We submit that on the basis of the above authorities this court should not disturb the decision of the statutory court.

The Court should order the bill of complaint dismissed since appellant has failed to show that any substantial or irreparable injury will result from its compliance with the order of the Commission.

(Appellant's Brief, pp. 47-49.)

In the consideration of this case the Court will note that appellant's bill of complaint was predicated in part upon an allegation that the commission intended to regulate its rates and that the order of March 3rd was a preliminary step to the Commission's plan to determine the reasonableness of the price to be paid by the Chicago District Co. for gas purchased from appellant. (R. 6, Bill of Complaint, paragraph 11.)

Appellees have denied this allegation in their sworn answer. The appellant has shifted its ground for it no longer argues that the Commission contemplates direct regulation of its rates. To the extent then that the bill is predicated upon this allegation, its bill of complaint should be dismissed since an injunction will not be issued in the absence of threat of actual or substantial injury. In *McChord* v. *Louisville & N. R. R. Co.* (1902) 183 U. S. 483, 502, 46 L. Ed. 289, 22 S. Ct. 165, suit was brought to enjoin a State Commission from proceeding under a statute authorizing it to fix railway rates. It was contended that the act in question was unconstitutional. It appeared that the Commission had taken no steps to fix the railroads rates. The District Court dismissed the bill of complaint and its decision was affirmed by the Supreme Court. The Court held:

> "that the duty of enforcing its rates rests on the Commission and that none of the consequences alleged to be threatened can be set up as the basis of equity interposition before the rates are fixed at

all. Whether after they are determined their enforcement can be restrained is a question not arising for decision on this record."

In its argument alleging irreparable injury if it is compelled to comply with the Commission's order, appellant states on page 12 of its brief:

> "The injury of which the Court is asked to take cognizance is the damage which will ensue immediately upon compliance with the order already issued. Irreparable loss to the appellant will not await the final incidence of the rate order which the Commission is preparing to make against the Chicago District Company. Great and irremediable damage to appellant's business will be inflicted immediately by compliance with the Commission's interlocutory order. This damage includes the cash outlay involved in compliance, injury to appellant's credit and the effect thereof upon its cost of operation and program of expansion."

It should be readily apparent to the Court that in so far as the appellant will be injured as a result of the expense of complying with the order of March the 3rd, such expense does not warrant further hearings on its bill or justify reversal of the decision of the District Court. If, as we submit we have demonstrated, it is true that Section 8a does not violate the Due Process clause, and the Commission's order does not violate the Commerce Clause, the mere fact that the appellant will be required to expend money for the purpose of complying with the Commission's order, is not sufficient injury to warrant issuance of an injunction. Less data is required here than in the *Western Distributing Co.* case, or the *Smith* case because the property of appellant has been recently constructed and the order of March 3rd requires cost and earnings data only.

It is equally clear that the allegation that irreparable

injury to its credit will result from compliance with the Commission's order does not warrant reversal of the District Court's decision. The claim that injury will arise as a result of the mere disclosing of information as to its profits must be ignored because this is apparently predicated upon the erroneous notion that the publication of statements of earnings would adversely affect its credit. The appellant should have no greater difficulty in raising new money for extensions because of the fact that its earning statements have been made available to the Commission. In fact no cautious creditor would advance money without this type of statement.

Furthermore, if publication of earning statements had any really serious affect upon earnings the growth of the utility industry would have ceased many years ago.

When appellant claims that its credit will suffer irreparable injury it apparently is referring to possible future expansion and not its present financial status. These allegations as to injury are purely conjectural and hypothetical in character. The Constitution does not provide protection against such hypothetical claims as to profits.

In *West Ohio Gas Co.* v. *Ohio Commission* (1935) 294 U. S. 63, 78, 79 L. Ed. 773, 55 S. Ct. 324, Mr. Justice Stone, in a concurring opinion, declared:

> "The property for which constitutional protection is invoked is that used and useful in the public service, not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money."

In so far as the appellant's injury will arise from the indirect affect of a possible reduction in Chicago

District rates to its local distributing companies, obviously that allegation does not support the issuance of an injunction for the Commission has not cut Chicago District's rates. Even if the Commission were to cut those rates, it is difficult to see what right appellant would have for relief on this ground.

We again call the Court's attention to *State Corporation Commission* v. *Wichita Gas Co., supra.* Under this decision the order of March 3rd is legislative in character and therefore does not violate the due process clause.

We submit, therefore, that appellant has completely failed to make a showing of great and irreparable injury warranting the exercise of the jurisdiction of the Federal Court, and that, therefore, this Court should direct the District Court to dismiss its bill of complaint.

The appellees are now suffering and will continue to suffer substantial injury if denied access to the information demanded by the order of March 3rd. The Court should disregard the suggestion that even if appellees be found to be entitled to a final decree an interlocutory injunction should be granted.

(Appellant's Brief, pp. 50, 51).

On page 14 of this brief we have pointed out the serious adverse effect that an entry of an injunction would have upon the Commission's ability to determine the reasonableness of Chicago District's rate.

The suggestion, therefore, that this Court should set aside the decree of the statutory court because the information demanded in its order of March 3rd cannot now be used in the Peoples Gas Company rate proceedings should properly be ignored by the Court. The true rule of law is that unless the Court is convinced that the complainant will succeed at final hearing a preliminary injunction should be denied. *Hall Signal Co.* v. *General Railway Signal Co.*, 153 Fed. 907 (C. C. A. 2d. 1907).

A proper inference to be drawn from the argument made by the appellant on page 50 of its brief is that it does not expect to win the case upon final hearing, and that it merely seeks to obtain injunctive relief for the purpose of delay.

The argument set forth at pages 52-54 of Appellant's Brief is not material to the issues in this case.

The arguments advanced by appellant at pages 52, 53 and 54 of its brief are directed entirely to sustaining the jurisdiction of the federal court over the subject matter of this cause. We have not questioned the right of the statutory court to entertain a case of this kind, but we contended below and still maintain that the bill of complaint and the affidavits in support thereof, do not set up such a situation as would justify a federal court of equity in issuing an injunction to restrain the action of the State Commission.

The size of the penalties provided in the Illinois Public Utility Act are not alone sufficient to warrant the interference of a federal court of equity, when as we have already pointed out, the Commission's order does not infringe upon any of the rights guaranteed to the appellant by the Constitution of the United States. The cases cited by appellant at pages 53 and 54 do not warrant the issuance of an injunction to restrain the enforcement of the Commission's order, when as here, no violation of the constitutional rights is shown by the appellant for such an injunction. Those cases apply only if some grounds for equitable relief appear. No such grounds do appear in this case, as we have already pointed out.

CONCLUSION.

I.

We respectfully submit that inasmuch as we have demonstrated hereinabove (1) that the order of the Commission complained of was duly authorized by Section 8a of the Illinois Public Utilities Act, (2) that Section 8a of the Public Utilities Act does not contravene either the 14th Amendment or the Commerce Clause of the Constitution of the United States, (3) the statute is a valid part of the legislative rate-making process of the State of Illinois, (4) the order was entered for the purpose of enabling the Commission to determine the reasonableness of the rates and operating expenses of the Chicago District Pipeline Company, a local public utility subject to its jurisdiction, (5) that the order of the Commission is in the nature of a subpoena, (6) that no substantial or irreparable injury will be suffered by appellant by the denial of an interlocutory injunction, and (7) that the Commission will be seriously injured and hampered in its regulation of an intrastate public utility company if it is not able to secure the information sought, the order of the statutory court of July 2, 1937, should be affirmed.

II.

Since the questions involved in this case are entirely questions of law as we have pointed out, since no useful purpose would be served by a hearing of evidence in this cause and since appellants allegations as to damages to be suffered are not only unfounded but predicated largely upon alleged injuries to be suffered in the event the Commission reduces the rates of the Chicago District Pipeline Company, this suit is premature, and we respectfully submit that the lower court should be instructed to dismiss the bill filed by appellant.

Respectfully submitted,

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APPENDIX A.

Sec. 8a of the Illinois Public Utilities Act Referred to in this Brief.

§ 8a. (1) The commission shall have jurisdiction over holders of the voting capital stock of all public utilities under the jurisdiction of the commission to such extent as may be necessary to enable the commission to require the disclosure of the identity in respective interests of every owner of any substantial interest in such voting capital stocks. One per centum or more is a substantial interest, within the meaning of this subdivision.

(2) The commission shall have jurisdiction over affiliated interests having transactions, other than ownership of stock and receipt of dividends thereon, with public utilities under the jurisdiction of the commission, to the extent of access to all accounts and records of such affiliated interests relating to such transactions, including access to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions; and to the extent of authority to require such reports with respect to such transactions to be submitted by such affiliated interests, as the commission may prescribe. For the purpose of this section, the phrase "affiliated interests" means:

(a) Every corporation and person owning or holding, directly or indirectly, ten per centum or more of the voting capital stock of such public utility;

(b) Every corporation and person in any chain of

successive ownership of ten per centum or more of voting capital stock;

(c) Every corporation, ten per centum or more of whose voting capital stock is owned by any person or corporation owning ten per centum or more of the voting capital stock of such public utility, or by any person or corporation in any such chain of successive ownership of ten per centum or more of voting capital stock;

(d) Every corporation, ten per centum or more of whose voting securities is owned, directly or indirectly by such public utility;

(e) Every person who is an elective officer or director of such public utility or of any corporation in any chain of successive ownership of ten per centum or more of voting capital stock;

(f) Every corporation which has one or more elective officers or one or more directors in common with such public utility;

(g) Every corporation or person which the commission may determine as a matter of fact after investigation and hearing is actually exercising any substantial influence over the policies and actions of such public utility even though such influence is not based upon stock holding, stockholders, directors or officers to the extent specified in this section.

(h) Every person or corporation who or which the commission may determine as a matter of fact after investigation and hearing is actually exercising such substantial influence over the policies and actions of such public utility in conjunction with one or more other corporations or persons with which or whom they are related by ownership or blood relationship or by action

in concert that together they are affiliated with such public utility within the meaning of this section even though no one of them alone is so affiliated.

Provided, however, that no such person or corporation shall be considered as affiliated within the meaning of this section if such person or corporation is otherwise subject to the jurisdiction of the commission or such person or corporation shall not have had transactions or dealings other than the holding of stock and the receipt of dividends thereon with such public utility during the two-year period next preceding.

(3) No management, construction, engineering, supply, financial or similar contract and no contract or arrangement for the purchase, sale, lease or exchange of any property or for the furnishing of any service, property or thing, hereafter made with any affiliated interest, as hereinbefore defined, shall be effective unless it shall first have been filed with and consented to by the commission. *Provided, however,* that the commission shall have authority to condition such approval in such manner as it may deem necessary to safeguard the public interest. *Provided, further,* that the commission shall be empowered to except from the provisions of this subparagraph contracts or arrangements made in the ordinary course of business covering normal requirements at not to exceed standard or prevailing market prices. If it be found by the commission, after investigation and a hearing, that any such contract is not in the public interest, the commission is hereby authorized to disapprove such contract. Every contract or arrangement not consented to or excepted by the commission as provided for in this section shall be void.

The consent to any contract or arrangement as re-

quired above, shall not constitute approval of payments thereunder for the purpose of computing expense of operation in any rate proceeding.

(4) The commission shall have authority by general rules applicable alike to all public utilities affected thereby, to waive the filing and necessity of approval of contracts and arrangements described in subparagraph (3) of this section, where the total obligation to be incurred under or by reason of such contract or arrangement shall not be in excess of five hundred dollars ($500). *Provided, however,* that if the commission, after a hearing, finds that any public utility is abusing such general rule and thereby evading the purposes of subparagraph (3) hereof, the commission shall have power to require such public utility to thereafter file and receive the commission's approval upon all contracts and arrangements described in subparagraph (3) of this section, regardless of amount, and said general rule herein referred to shall remain in full force and effect as to all other public utilities. (Chap. 111⅔, Ill. Rev. Stat. 1937, Sec. 8a.)

APPENDIX B.

Provisions of the Public Utilities Act of 1935 Referred to in this Brief.

DEFINITIONS

"SEC. 2 (11) 'Affiliate' of a specified company means—

(A) any person that directly or indirectly owns, controls, or holds with power to vote, 5 per centum or more of the outstanding voting securities of such specified company;

(B) any company 5 per centum or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by such specified company;

(C) any individual who is an officer or director of such specified company, or of any company which is an affiliate thereof under clause (A) of this paragraph; and

(D) any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon affiliates of a company."

SERVICE, SALES, AND CONSTRUCTION CONTRACTS

"SEC. 13 (e) It shall be unlawful for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or sub-

sidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract, by which such affiliate undertakes to perform services or construction work for, or sell goods to, any such company of which it is an affiliate, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters, as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

ACCOUNTS AND RECORDS

"SEC. 15. (b) Every affiliate of a registered holding company or of any subsidiary company thereof, or of any public-utility company engaged in interstate commerce or not so engaged, shall make, keep, and preserve for such periods, such accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records relating to any transaction of such affiliate which is subject to any provision of this title or any rule, regulation, or order thereunder, as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or for the enforcement of the provisions of this title or the rules, regulations or orders thereunder." (Public, No. 333, 74 Cong. 15 U. S. C. A. —.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230.

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,

v.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

Appeal from the District Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL APPENDIX.

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W. ROBERT MING, JR.,
ADA L. STERN,
Assistants Attorney General,
Of Counsel.

[illegible] & Judd, Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 230.

NATURAL GAS PIPELINE COMPANY OF AMERICA,
a Corporation,

v.

JAMES M. SLATTERY, ANDREW OLSON, CHARLES E. BYRNE, JAMES D. MARNANE and HARRY A. BARR, the Persons Constituting the Illinois Commerce Commission of the State of Illinois, and OTTO KERNER, Attorney General of the State of Illinois.

Appeal from the District Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL APPENDIX.

Appendix C.

Certain provisions of the Public Utilities Act of Illinois (An Act Concerning Public Utilities, approved June 29, 1921, as Amended) referred to during Oral Argument.

Hearings—Orders—Record—Record on Appeal—Copies of Official Documents and Orders—Evidence—Notice.

§ 65. At the time fixed for any hearing upon a complaint, the complainant and the person or corporation complained of, and such persons or corporations as the commission